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Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify

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IMPROVING THE RELIABILITY OF CRIMINAL TRIALS THROUGH LEGAL RULES THAT ENCOURAGE DEFENDANTS TO TESTIFY

Jeffrey Bellin*

Reflecting a traditional bias against defendants' trial testimony, the modern American criminal justice system, which now recognizes a constitutional right to testify at trial, unabashedly encourages defendants to waive that right and remain silent. As a result, a large percentage of criminal defendants decline to testify, forcing juries to decide the question of the defendant's guilt without ever hearing from the person most knowledgeable on the subject.

This Article contends that the inflated percentage of silent defendants in the American criminal trial system is a needless, self-inflicted wound, neither required by the Constitution nor beneficial to the search for truth. Consequently, the Article proposes two alternative reforms designed to eliminate, or at least minimize, the legal inducements to remaining silent at trial. The reforms, if adopted, would encourage a greater number of defendants to testify (and be cross-examined), funneling more factual information into the crucible of the adversary process, and thereby increasing the reliability of trial outcomes.

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Introduction ........................................................................................................... 852
I. The Value of Hearing From the Defendant at Trial ........................................... 854
II. A Tale of Two Rights: The Right to Testify and The Right Not to Testify .. 859
   A. The Defendant’s Constitutional Right to Testify ........................................ 860
   B. The Defendant’s Constitutional Right Not to Testify .................................. 862
III. Unequal Rights: Burdens on Defendant Testimony and Rewards for Defendant Silence ................................................................................................................. 863
   A. Impeachment With Prior Convictions .......................................................... 863
   B. Cross-Examination With Otherwise Inadmissible Evidence ...................... 868
   C. Trial Courts and Prosecutors May Not Comment Adversely on a Defendant’s Refusal to Testify ................................................................. 872
   D. A Prosecutor May Comment on a Testifying Defendant’s “Opportunity” to Tailor Testimony ......................................................................................... 873
   E. Favorable Jury Instructions For Silent Defendants ...................................... 875
   F. Adverse Instructions Regarding Defendant Testimony .............................. 876
   G. Increased Penalties For Testifying Defendants .......................................... 877
IV. An Alternative Incentive Scheme ..................................................................... 880
   A. Reform Alternative No. 1: Alter the Existing Framework ......................... 882
   B. Reform Alternative No. 2: Bargaining Around the Default Framework Through In Limine Motions ................................................................. 890
Conclusion .................................................................................................................. 896

INTRODUCTION

Although the exact numbers vary by jurisdiction, studies reveal that up to half of all criminal defendants who proceed to trial elect not to testify on their own behalf, and that this percentage has been increasing since at least the early twentieth century. One reason defendants decline to testify is that over the past two centuries, the courts have constructed an elaborate jurisprudence vigorously protecting the right
not to testify, and an equally elaborate jurisprudence permitting numerous burdens to be placed on the right to testify. This case law has no unifying legal principle, but a common practical effect—encouraging defendants to remain silent at trial.

As there are numerous reasons why the criminal justice system should seek to encourage defendants to testify and no clear reasons to encourage them to remain silent, this Article proposes two alternative reforms designed to induce defendants to “cast aside [their] cloak of silence”2 and exercise their constitutional right to testify. By encouraging more defendants to testify (and be cross-examined), the reforms would not necessarily benefit defendants or prosecutors, but can be expected to improve the reliability of trial outcomes by maximizing the factual information available to the jurors who must decide a defendant’s fate.3

Part I of the Article illustrates the desirability of the goal of the proposed reforms, summarizing the various benefits that would accrue to the criminal justice system and society generally if more defendants were to testify. Part II sketches the constitutional bounds within which the reforms must operate, providing a background discussion of the history of the constitutional right to testify and the right not to testify—a history that continues to resonate through the modern patchwork of legal rules surrounding those rights. Part III then illustrates the modern parameters of these countervailing rights, detailing the legal rules that have brought about the defendant-silencing status quo by severely penalizing defendants who exercise the right to testify (e.g., by permitting impeachment with prior convictions) and significantly rewarding those who remain silent (e.g., by prohibiting adverse prosecutorial comment on a defendant’s trial silence). Part IV presents two alternative reform proposals designed to alter the status quo.

The first proposal, the more obvious and direct approach to encouraging a greater percentage of defendants to testify, would eliminate many of the existing incentives to silence and disincentives to testifying through a discrete set of changes to the rules governing

2. This colorful image appears in Jenkins v. Anderson, 447 U.S. 231, 238 (1980), which excused the prejudicial impeachment of a testifying defendant on the ground that it “follows the defendant’s own decision to cast aside his cloak of silence.” Id.; see also Raffel v. United States, 271 U.S. 494, 497 (1926) (“[H]aving once cast aside the cloak of immunity, [a defendant] may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.”).

3. See Akhil Reed Amar & Renee B. Letow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L. REV. 857, 864, 922 (1995) (arguing in a related context that “one can simultaneously reduce both false negatives and false positives only by bringing more information into a system” and that “[o]ur current system throws out too much information, and in the end, this hurts both truth-seeking prosecutors and innocent defendants”).
criminal trials. As the legal rules that would be affected by this change currently serve little purpose other than to discourage testimony, the reform engenders few negative collateral consequences. The second, more modest, proposal seeks to increase the percentage of testifying defendants within the existing criminal procedure framework through the early identification and potential resolution of obstacles to a defendant's testimony in a new, formally structured in limine procedure. Both proposals seek to accomplish the goal of maximizing the percentage of defendants who testify—and thus the facts available to the jury—within constitutional parameters, while at the same time minimizing any alteration of the current balance of power between the prosecution and the defense.

I. THE VALUE OF HEARING FROM THE DEFENDANT AT TRIAL

It is difficult to perceive any legitimate criminal justice or societal interest that is served when a defendant declines to testify at trial. There are, however, decided disadvantages for both the criminal justice system and society in general when the right to remain silent is invoked.

First and foremost among the disadvantages is that the reliability of the trial process suffers. When the defendant, "who above all others may be in a position to meet the prosecution's case," is silent, the jury is deprived of critical factual information. This deprivation increases the danger of a verdict based on "a partial ... presentation of the facts" and at the same time impairs the related "public interest in a full and truthful disclosure of critical facts." Indeed, the Supreme Court, which bears

4. Ferguson v. Georgia, 365 U.S. 570, 582 (1961) ("[D]ecades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case."); Carter v. Kentucky, 450 U.S. 288, 306 (1981) (Stewart, J., concurring) ("The one person who usually knows most about the critical facts is the accused."); Renee Lettow Lerner, The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises, 2001 U. ILL. L. REV. 791, 824-25 ("The defendant always knows information important to the fact-finder—if nothing else, where he was at the time the crime was committed."); Albert W. Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 MICH. L. REV. 2625, 2636 (1996) ("The virtues of an 'accusatorial' system in which defendants are privileged to remain passive are far from obvious. The person who knows the most about the guilt or innocence of a criminal defendant is ordinarily the defendant herself. Unless expecting her to respond to inquiry is immoral or inhuman . . . renouncing all claim to her evidence is costly and foolish."); John H. Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 MICH. L. REV. 1047, 1055 (1994) ("The aspiration to capture the defendant as a testimonial resource is perfectly understandable. He is, after all, the most efficient possible witness.").
6. Taylor v. Illinois, 484 U.S. 400, 412 (1988); United States v. Bryan, 339 U.S. 323, 331 (1950) ("For more than three centuries it has . . . been recognized as a fundamental maxim that the
primary responsibility for the silencing of defendants, has itself recognized the imperative for defendant testimony, explaining:

[The conviction of our time] is that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury.

As the Court has emphasized in other contexts, "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive," and "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts." 8

The decreased reliability of trial outcomes due to a partial presentation of facts is felt most severely in cases where an innocent, or partially innocent, defendant declines to testify. In such circumstances, the jury is deprived of testimony of incomparable value—truthful testimony from the witness most knowledgeable about the events in question—that could prevent unjust punishment by the state, and potentially an escape from justice by the guilty party. 9 The conviction of innocent defendants is particularly noxious because it not only offends any common conception of justice, but also undermines the legitimacy of the criminal justice system causing irreparable damage to society as a whole. 10

The loss of critical factual information when the defendant remains
silent at trial is also felt when the testimony that is foregone is the false testimony of a guilty defendant. This is because even false testimony, when recognized as such, provides valuable insights.

A premise of the American jury system is that false testimony will be exposed when subjected to the "crucible" of the adversary process.\textsuperscript{12} This premise is particularly forceful in the case of a defendant's testimony, which will be tested by cross-examination and the presentation of rebuttal evidence by a prosecutor possessing investigatory resources limited only by the prosecuting agency's estimation of the significance of the case. It is to be expected, then, that in the vast run of cases, a defendant's false testimony will be exposed or at least significantly undermined and, as a consequence, the search for truth will not be obscured by a lying defendant's perjury, but rather enlightened by the defendant's unintentional disclosure of a consciousness of guilt.\textsuperscript{13}

In the case of both the innocent and guilty defendant, the defendant's testimony also invariably helps to focus the trier of fact on the key issues in dispute. Without the testimony of the defendant, the defense strategy generally devolves into an effort to discredit any and all aspects of the prosecution's case, asserting generically that the prosecution has not

\textsuperscript{12} Briscoe v. LaHue, 460 U.S. 325, 334 (1983) ("[T]he truthfinding process is better served if the witness' testimony is submitted to 'the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.'" (quoting Imbler v. Pachtman, 424 U.S. 409, 440 (1976) (White, J. concurring in judgment))); Crawford v. Washington, 541 U.S. 36, 61 (2004) (stating that the Constitution "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"); Great Coastal Exp., Inc. v. Int'l Broth. of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982) ("Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible."); cf. California v. Green, 399 U.S. 149, 158 (1970) (describing cross-examination as the "'greatest legal engine ever invented for the discovery of truth'" (quoting 5 WIGMORE § 1367)).

\textsuperscript{13} See Mirjan Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 528 (1973) (explaining that continental European systems encourage defendant testimony even though it is often false, because "[i]t is believed that precious information can be obtained even from false denials of guilt, detected inconsistencies, and other verbal or non-verbal expressions emanating from the defendant's person"); Lerner, supra note 4, at 827 ("A defendant need not be truthful to reveal a great deal, as all detectives know."); Amar & Lettow, supra note 3, at 864, 903 (recognizing value of a lying witness in related context because the witness "may well sound unconvincing or trip himself up with inconsistent testimony," and will "be subject to impeachment via cross-examination and . . . introduction of other evidence and witnesses" leaving "[t]he jury . . . perfectly poised to assess witness credibility and to resolve factual disputes" which, "of course, is what we pay jurors to do"). Langbein, supra note 4, at 1053 (recounting view of 18th century commentator, Serjeant William Hawkins, on the virtue of defendant's testimony that even "[i]f the defendant is guilty" the testimony "may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them"); id. (recounting response to Hawkins that "'Hawkins' message is that it is desirable for the accused to speak, either to clear himself or to hang himself'".).
carried its burden of proof. Both the prosecution's presentation and the jury's deliberations then must presume every material fact to be in dispute, hindering the jury's ability to focus its deliberative energy on the critical issues in the case. When a defendant testifies, however, certain factual aspects of the case will likely be conceded so that the defendant can construct a logical narrative of his actions. This will allow the jury to focus on the actual areas of factual dispute between the prosecution's and the defendant's narratives. In such a circumstance, even if the defendant lies about some material facts—e.g., "I was there, but did not pull the trigger"—the jury has received valuable information—e.g., "I was there"—and can focus its deliberations accordingly, improving the likelihood of a reliable outcome.¹⁴

In addition to increasing the reliability of trial outcomes, maximizing the percentage of defendants who testify would also strengthen the perception of fairness, and thus perceived legitimacy, of the criminal justice system. A system in which a large percentage of criminal defendants are charged, tried, and either convicted or acquitted—a series of events that for many defendants will be defining moments in their lives—without ever speaking on their own behalf has been aptly described as a "massive democratic and human failure."¹⁵ Whatever one thinks about the value of a criminal defendant's speech in particular cases, it cannot be denied that viewed from a defendant's perspective, a system that accuses, judges, and, in some cases, even punishes without ever hearing from the accused appears unfair and dictatorial.¹⁶ The fine distinction that the defendant may have technically had an opportunity to testify is likely of little comfort in the confines of a prison cell. In no other context, from the termination of an employee to the informal punishment of misbehaving children, would it be considered just to mete out punishment without hearing from the accused.¹⁷

¹⁴. For example, in a murder prosecution the prosecution may attempt to establish that (i) the defendant knew the victim; (ii) wanted him dead; (iii) owned a gun; (iv) was present at the time of the murder; (v) shot the victim; and (vi) did so without legal justification. If the defense is simply that the prosecution has not met its burden, the jury must puzzle over each of these factual questions, and its diffuse focus may result in a mistaken outcome. If the defendant testifies, however, he will likely concede some of the points, for example that he knew the victim and was with him when he died, and contend only that another person pulled the trigger; the jury may accept those concessions and refocus its energies accordingly.

¹⁵. Natapoff, supra note 1, at 1449. Of course an even larger percentage of defendants waive their right to testify by pleading guilty.

¹⁶. Natapoff, supra note 1, at 1450 (recognizing that "some defendants do not even speak at their own sentencings"); cf. Lerner, supra note 4, at 825 (stating that active participation in French criminal trials often aids defendants because "even if the defendant does not outright confess, describing his thoughts or actions might in some cases make him appear more sympathetic or at least understandable").

¹⁷. Id. at 825 ("In everyday life, our methods of finding out the truth normally include talking
criminal justice system, this fairly common occurrence of rendering judgment without an account from the accused is countenanced and even celebrated as "a victory for defendants." 18

There is also a third interest that suffers when a substantial percentage of defendants never voice their perspective on the events that led them to court: the interest of the criminal justice system in developing an accurate perception of its street-level effects. Criminal practitioners, judges, and lawmakers are constantly striving to fine tune the workings of the criminal justice system. These efforts would benefit from the voices of defendants who (along with crime victims) are the primary "consumers" of that system. By encouraging defendants to remain silent throughout the process, the system suffers an "institutional loss of information about defendant perceptions and experiences" that decreases any potential recognition of what works, what does not work, and what should be changed. 19 Society, as represented by the thousands of jurors who move through the criminal justice system each day, would also benefit from hearing defendants' stories in order to better understand how various policies, e.g., "the war on drugs," are being implemented. In this sense, opening the door to more defendants' voices could provide untold advantages in terms of future political and legal reforms.

In contrast to these clear advantages of defendant testimony, there appear to be few, if any, valid reasons to discourage such testimony. 20

with a suspected person to hear his side of the story."; cf. Alschuler, supra note 4, at 2637 ("Criminal cases aside, there are apparently no investigative or fact-finding proceedings in which asking questions and expecting answers is regarded as dirty business."); Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) ("If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear.").

While defendants are permitted to speak on their own behalf at sentencing, the defendant's right to allocute at sentencing is generally displaced by a mixed legal and factual presentation of defense counsel, who often discourage lengthy client statements that could interfere with this presentation—promoting instead, "either complete silence or a truncated, inauthentic version of the defendant's feelings about the case." Natapoff, supra note 1, at 1466, 1468.

18. Natapoff, supra note 1, at 1450-51, 1493-95 (noting that "[c]ourts and scholars typically treat" the silencing of defendants "as a victory for defendants" but that "[d]efendants who remain silent throughout the legal process are less likely to understand their own cases, engage the dictates of the law intellectually, accept the legitimacy of the outcomes, feel remorse, or change as a result of the experience").

19. See id. at 1457, 1487 ("Criminal defendants are excluded from the 'marketplace of ideas' that shapes the criminal justice system."). An additional disadvantage of a system that celebrates defendant silence is that it undermines the civic ideal of cooperation with authorities. See R. Kent Greenawalt, Silence As a Moral and Constitutional Right, 23 WM. & MARY L. REV. 15, 49-50 (1981) (arguing that the symbol of silence in the face of authority while favorable in some respects has a "harmful side" in that it "may weaken the sense that obedience to law is something more than the bad man's calculation of most likely advantage").

20. The primary argument for broadly encouraging trial silence is that such silence protects not only the irrefutably guilty, but also a subset of innocent defendants whose low sophistication and
In fact, the primary beneficiaries of a legal system that discourages defendant testimony is a small subset of guilty defendants who, because they have no plausible defense, would not testify under any legal regime. By providing numerous tactical advantages to defendants who remain silent that have little to do with guilt or innocence, the current system primarily aids the cause of these hopelessly guilty defendants by lending credence to the belief that even innocent defendants remain silent at trial.

II. A TALE OF TWO RIGHTS: THE RIGHT TO TESTIFY AND THE RIGHT NOT TO TESTIFY

One of the most surprising aspects of the American criminal justice system’s essentially punitive patchwork of rules governing defendant testimony is how little of the current system is dictated by its constitutional or historical roots. To highlight the degree to which modern jurisprudence has strayed from those roots, and simultaneously to sketch the constitutional parameters of the defendant’s decision to testify or remain silent, this Part briefly summarizes the history of the two countervailing rights at issue.

personal mannerisms are such that even armed with the truth, they will appear guilty under the skilled questioning of a prosecutor. See Carter v. Kentucky, 450 U.S. 288, 300 n.15 (1981) (recognizing “[e]xcessive timidity” and “nervousness when facing others” as traits potentially likely to betray an innocent defendant who takes the stand (quoting Wilson v. United States, 149 U.S. 60, 66 (1893))); Schulhofer, supra note 1, at 330 (arguing that some innocent defendants may be better off not testifying because, inter alia, they “may look sleazy” have a “vague memory” of events or be “inarticulate, nervous or easily intimidated”); Amar & Lettow, supra note 3, at 922–23 (“[E]ven a good lawyer cannot always save an innocent but unpersuasive-sounding client from being demolished on the stand.”). This narrative of innocent, but overly anxious, defendants who must be protected from their own testimony is unpersuasive for at least three reasons. First, the suggestion that truthful testimony should be discouraged because it may be disbelieved is overbroad as it applies to every witness, not just defendants. It is thought, however, that generally applicable trial rules, such as limits on cross-examination (the attorney sponsoring the witness may object to irrelevant, argumentative questions, etc.) overseen by a neutral judge, and allowing the sponsoring attorney to clarify witness testimony on redirect examination, obviate this problem; if this process works for witnesses generally, there is no reason to believe it would not work for defendants. Second, this justification for trial silence ignores that lay jurors, no doubt having just experienced some form of “stage-fright” during voir dire, are fully equipped to understand such factors as a particular defendant’s relative lack of sophistication or nervousness when placed on trial, and these concerns can be fully brought out by defense counsel on direct examination. Third, as with a significant witness in any case, competent counsel should be expected to prepare a defendant for cross-examination in advance of trial (and to seek out corroboration for the defendant’s testimony), decreasing the likelihood that a defendant who speaks the truth will be made to appear guilty by virtue of prosecutorial questioning. See also infra note 130 (suggesting ways to mitigate prejudice that might result when a defendant declines to testify for reasons other than guilt of the charged crime).
A. The Defendant's Constitutional Right to Testify

In the American courts as they existed at the time of the adoption of the Bill of Rights, and in the decades that followed, the question of the proper incentives and disincentives to apply to a criminal defendant's testimony was resolved by the simple, elegant, and, as it turns out, unconstitutional solution of prohibiting any sworn testimony by the accused. Defendants at the end of the eighteenth century were not faced with anything approximating the contemporary dilemma of whether or not to testify because they were simply "disqualified from testifying under oath."\(^\text{21}\)

As recent scholarship has demonstrated, however, this prohibition of sworn testimony presents a somewhat incomplete picture of trials of the period. In truth, a defendant's sworn testimony would have been somewhat redundant in late eighteenth century trials. Defendants were expected to provide a "pretrial statement" to a justice of the peace detailing their account of the events in question, and "typically spoke and conducted their defense personally, without counsel," invariably presenting "their story" to the jurors.\(^\text{22}\) Thus, while defendants were forbidden the right to testify, the courts of the time were not so foolhardy as to deprive themselves of any useful factual information a defendant might provide.\(^\text{23}\) Indeed, while defendants' sworn testimony was prohibited, their unsworn statements were practically compelled. Usually deprived of counsel and subject to having the pretrial statement (or lack thereof) referred to at trial, a defendant's "refusal to respond" through unsworn statements to incriminating charges "would have been suicidal."\(^\text{24}\)

\(^{21}\) Portuondo v. Agard, 529 U.S. 61, 66 (2000) (observing that at time of the adoption of the Bill of Rights, "what [defendants] said at trial was not considered to be evidence, since they were disqualified from testifying under oath"); McGautha v. California, 402 U.S. 183, 214 (1971) ("At the time of framing of the Fifth Amendment and for many years thereafter the accused in criminal cases was not allowed to testify in his own behalf."); Nix v. Whiteside, 475 U.S. 157, 164 (1986) ("The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case.").

\(^{22}\) Portuondo, 529 U.S. at 66; see generally Langbein, supra note 4; Alschuler, supra note 4.

\(^{23}\) Cf. Ullmann v. United States, 350 U.S. 422, 426-28 (1956) ("The Founders of the Nation were not naive or disregardful of the interests of justice."); Mapp v. Ohio, 367 U.S. 643, 657 (1961) ("There is no war between the Constitution and common sense.").

\(^{24}\) Langbein, supra note 4, at 1048-49 ("Undergirding the procedural rules of the early modern trial at common law was a set of rules and practices whose purpose and effect were to oblige the accused to respond to the charges against him."); Alschuler, supra note 4, at 2631 ("Until the nineteenth century was well underway, magistrates and judges in . . . America expected and encouraged suspects and defendants to speak during pretrial interrogation and again at trial. Fact finders did not hesitate to draw inferences of guilt when defendants remained silent. The informal inducements of prenineteenth
In the latter part of the nineteenth century, this procedural landscape was altered by the enactment of statutes permitting defendants to give sworn testimony in federal court and state courts, excepting only Georgia. The reformers who spearheaded this change did not necessarily intend to assist criminal defendants; in fact, one of the leading advocates for reform argued that defendants' incompetence to testify had "served the guilty as a shield" from cross-examination "and thus disserved the public interest." Conversely, the greater part of those opposing the reform believed allowing defendants to testify under oath "threatened erosion of the privilege against self-incrimination and the presumption of innocence."

The proponents of reform, of course, carried the day and, indeed, the century as the law regarding defendants' testimony was turned upside down, and it became "the considered consensus of the English-speaking world" that "there was no rational justification for prohibiting the sworn testimony of the accused." Bowing to this consensus, the Supreme Court gradually enshrined the opportunity to testify under oath with

25. Ferguson v. Georgia, 365 U.S. 570, 577 (1961) ("Before the end of the century every State except Georgia had abolished the disqualification."); Nix, 475 U.S. at 164 ("By the end of the 19th century . . . the disqualification was finally abolished by statute in most states and in the federal courts."). A federal statute permitting defendants to give sworn testimony was enacted in 1878. See 18 U.S.C. § 3481 (2000) ("In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.").

With the advent of these reforms and the more frequent participation of defense counsel in criminal trials, the pretrial statement gradually fell into disuse. See Portuondo, 529 U.S. at 66 ("The pretrial statement did not begin to fall into disuse until the 1830's . . ."); cf. Ferguson, 365 U.S. at 586 ("The system of allowing a prisoner to make a statement had been introduced as a mere makeshift, by way of mitigating the intolerable hardship which occasionally resulted from the prisoner not being able to speak on his own behalf.").


27. Id. at 578. In the wake of this reform, many who had opposed it on this ground came to rethink their views, accepting that "innocence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath." Id. at 580-81.

28. Id. at 582; Reagan v. United States, 157 U.S. 301, 305-06 (1895) ("The old law was that interest debarred one from testifying, for fear that such interest might tend to a perversion of the truth. A more enlightened spirit has thrown down this barrier, and now mere interest does not exclude one from the witness stand, but the interest is to be considered as affecting his credibility.").
constitutional status, finally holding in 1987 that "[t]he right to testify on one's own behalf at a criminal trial," while not explicitly referenced in the constitutional text, is guaranteed by the Fifth, Sixth and Fourteenth Amendments. 29

B. The Defendant's Constitutional Right Not to Testify

A defendant's right not to testify has a more distinguished pedigree than its younger relation the right to testify, beginning with its firm textual source in the Fifth Amendment to the Constitution that commands that no person "shall be compelled in any criminal case to be a witness against himself." 30 The right also has deep historical roots, representing a tangible result of the political abuses America's founders fought to eliminate. 31

The right to remain silent in the face of accusation has been widely celebrated in American law, representing in the words of the Supreme Court "an important advance in the development of our liberty" and "one of the great landmarks in man's struggle to make himself civilized." 32 As famously stated, the right, among other things, protects the guilty defendant from "the cruel trilemma of self-accusation, perjury or contempt," by allowing the guilty to sit silently while "requiring the government . . . to shoulder the entire load" of a criminal prosecution. 33

29. Rock v. Arkansas, 483 U.S. 44, 49–51 (1987) (ruling that "[a]t this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense," while noting that this was "a change from the historic common-law view, which was that all parties to litigation, including criminal defendants, were disqualified from testifying because of their interest in the outcome of the trial"). Although the Court had repeatedly assumed or hinted that a defendant had a constitutional right to testify prior to the decision in Rock, see, e.g., Ferguson, 365 U.S. at 582, Harris v. New York, 401 U.S. 222, 225 (1971), it had not explicitly held that there was such a right or designated its source in the Constitution. See Nix, 475 U.S. at 164 (noting in 1986 that Court had "never explicitly held" the right existed, although it had "suggested" its existence); see also United States v. Dunnigan, 507 U.S. 87, 96 (1993) ("The right to testify on one's own behalf in a criminal proceeding is . . . a right implicit in the Constitution.") (citing Rock and Nix); Alschuler, supra note 4, at 2664.


31. Brown v. Walker, 161 U.S. 591, 597 (1896) ("So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impenetrability of a constitutional enactment.").


33. Murphy, 378 U.S. at 55. The Supreme Court's celebratory statements, which have been relied upon to promote an expansive interpretation of the Fifth Amendment, have been critiqued by numerous observers as essentially sloganeering. See, e.g., Henry J. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CIN. L. REV. 671, 682-695 (1968) (critiquing the rationales provided by the Supreme Court and others to support an expansive Fifth Amendment
The Court has emphasized that the values protected by the right not to testify are so important that they easily overcome the fact that it may on occasion "save a guilty man from his just deserts." At least with respect to the defendant's testimony at trial, the implications of the Fifth Amendment right have long been clear: "The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth."

III. Unequal Rights: Burdens on Defendant Testimony and Rewards for Defendant Silence

Although both the right to testify and the right to remain silent at trial share nominally equivalent status as constitutional rights, the two rights have not been treated equally. The Supreme Court has permitted severe burdens to be placed on the right to testify, while prohibiting the placement of equivalent burdens on the right to remain silent at trial.

In light of the complex and unequal treatment of the two rights, criminal defendants are now faced with a dizzying array of legal rules that shape the already complicated tactical calculus of whether or not to testify. As detailed below, in evaluating the implications of these rules, a properly advised defendant who wishes to testify must consider not only the numerous legal burdens that attach should he do so, but also the many court-created benefits of remaining silent that will be foregone.

A. Impeachment With Prior Convictions

The most widely recognized and stark disincentive to taking the witness stand is that if, and in most cases only if, a defendant testifies, the prosecution can then inform the jury of the defendant's prior criminal convictions. While often viewed solely as a product of the jurisprudence as "mere rhetoric," "largely conclusory," and, in sum, a "rather slender basis" for then-existing doctrine; Amar & Lettow, supra note 3, at 892 (characterizing analogous arguments in favor of expansive Fifth Amendment jurisprudence as "more like slogans that merely restate the rule than considered rationales").

36. See Natapoff, supra note 1, at 1483 ("[T]he Court's protection of the defendant's right to speak is markedly weaker than its protection of the right to remain silent.").
37. See Fed. R. Evid. 609; United States v. Dunnigan, 944 F.2d 178, 183-84 (4th Cir. 1991), rev'd on other grounds, 507 U.S. 87 (1993) ("[T]here are many reasons unrelated to guilt that may
rule permitting credibility impeachment with prior convictions—Federal Rule of Evidence 609—this disincentive to testifying is, in fact, the product of two separate rules, one favoring defendants and the other favoring the prosecution.

The rule favoring defendants is that if the defendant elects not to testify, evidence of previous malfeasance, including prior convictions, is generally inadmissible. More specifically, under Federal Rule of Evidence 404, “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” This rule represents a defendant-friendly policy determination that precludes admission of prior crimes as substantive, propensity evidence. As the Supreme Court has explained, the inquiry into propensity “is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”

Absent the policy-based prohibition contained in Rule 404, evidence of criminal convictions would presumably be admissible to prove that a defendant with a criminal record committed a subsequent charged crime whether or not the defendant testified at trial. Under such a regime,
the potential that a defendant would be impeached with prior convictions would, of course, have no bearing on the decision whether or not to testify. Given the general prohibition of evidence of a defendant's prior convictions as substantive evidence, however, a rule permitting the use of that evidence to impeach a testifying defendant assumes great significance in deterring even innocent defendants from testifying.

Although criticized for decades by commentators, the practice of impeaching testifying defendants with prior convictions has long been

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44. Lerner, supra note 4, at 824 (noting the fact that a defendant's criminal record is considered in the French criminal justice system regardless of whether the defendant testifies as one of the "incentives" in that system for the defendant to testify).

45. See, e.g., Carter v. Kentucky, 430 U.S. 288, 300 n.15 (1981) (noting that "fear of impeachment by prior convictions (the petitioner's fear in the present case)" dissuades defendants from testifying); Griffin v. California, 380 U.S. 609, 615 (1965) ("Defendant contends that the reason a defendant refuses to testify is that his prior convictions will be introduced in evidence to impeach him and not that he is unable to deny the accusations. It is true that the defendant might fear that his prior convictions will prejudice the jury, and therefore another possible inference can be drawn from his refusal to take the stand."

46. See, e.g., Alan D. Hornstein, Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction, 42 VILL. L. REV. 1, 62–63 (1997) (contending that impeachment by prior convictions places an intolerable burden on the right to testify); Friedman, supra note 10, at 678 (arguing that impeachment of defendants with prior convictions should be precluded because "[c]haracter impeachment evidence of an accused has virtually no probative value with respect to credibility, but its availability has tremendous prejudicial impact"); Robert D. Dodson, What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence, 48 DRAKE L. REV. 1, 51 (1999) (endorsing "a per se rule disallowing prior conviction evidence"); H. Richard Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U. PA. L. REV. 845, 868 (1982) (suggesting that "the impeachment rubric is a hoax, merely a cover for the admission of evidence bearing on propensity—which is what the rule's defenders are probably seeking"); Greenawalt, supra note 19, at 58 (arguing that "innocent defendants in many American jurisdictions are deterred from testifying by the unjust practice of allowing prior convictions to be routinely admitted to impeach a defendant's credibility"); cf. Spencer v. Texas, 385 U.S. 554, 577 (1967) (recognizing that "the theory justifying admission of evidence of prior convictions to impeach a defendant's credibility has been criticized").
accepted by the courts and is now firmly entrenched in the Federal Rules of Evidence.\footnote{See Ohler v. United States, 529 U.S. 753, 757 (2000) ("[O]nce the defendant testifies, she is subject to cross-examination, including impeachment by prior convictions . . ."); McGautha v. California, 402 U.S. 183, 215 (1971) ("It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like."); United States v. Garber, 471 F.2d 212, 215-16 (5th Cir. 1972) ("Although firmly entrenched in criminal justice procedures, the admission of prior conviction evidence to impeach the defendant's credibility has been persistently criticized in recent years. . . ."; "Regardless of any criticism, the use of prior conviction evidence to impeach credibility is generally accepted as fair and proper.").} Rule 609 permits impeachment of the credibility of all witnesses, including criminal defendants, with convictions for crimes that involve so-called \textit{crimen falsi}, "proof or admission of an act of dishonesty or false statement," as well as convictions for all crimes punishable by more than one year in prison.\footnote{FED. R. EVID. 609(a)(2).} With respect to this second category—essentially all felonies—the Rule in subsection (a)(1) states that, for purposes of impeaching a testifying defendant, such convictions "shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused."\footnote{Id. at 609(a)(1). Under this Rule, impeachment of a testifying defendant with his prior convictions has become relatively routine practice. See Greenawalt, \textit{supra} note 19, at 58 (arguing that prior convictions are now "routinely admitted to impeach a defendant's credibility"); Ed Gainor, \textit{Character Evidence by Any Other Name . . .: A Proposal to Limit Impeachment by Prior Conviction Under Rule 609}, 58 GEO. WASH. L. REV. 762, 767, 780 (1990) (contending that "many courts have tended to admit virtually any prior felony for impeachment on the basis that the defendant's credibility is in issue—as, indeed, it virtually always will be, if the defendant denies the charges against him"); and that "[f]ederal courts of appeals have rarely reversed a trial judge's decision to admit evidence of prior convictions for impeachment"); see 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6134 (1993) (emphasizing that in most cases, where trial courts "at least claimed" to have "considered both probative value and prejudice" the "appellate courts usually defer to the decision of the trial court if there is any way to rationalize the balance struck"); Jeffrey Bellin, \textit{How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions}, 42 U.C. DAVIS LAW REVIEW (forthcoming 2008) (critiquing federal courts' jurisprudence under Rule 609(a)(1)), available at http://ssrn.com/abstract=1131742.} The Supreme Court has recognized that the prospect of "cross-examination, including impeachment by prior convictions . . . may deter a defendant from taking the stand,"\footnote{Ohler, 529 U.S. at 757, 759-60; see also Brooks v. Tennessee, 406 U.S. 605, 609 (1972) ("[A] defendant's choice to take the stand carries with it serious risks of impeachment and cross-examination.").} but has nonetheless concluded that the practice does not create an unconstitutional burden on the right to testify.\footnote{See Ohler, 529 U.S. at 757, 759-60 ("It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like . . . . Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh}
principle that celebrates "treating testifying defendants the same as other witnesses." In applying this principle, the Court appears unconcerned that defendants are unlike any other witnesses in a number of respects, including that they possess a constitutional right to testify and are singularly prejudiced by the ready susceptibility of prior conviction impeachment to improper use as propensity evidence.\footnote{53}

While the efficacy and fairness of impeachment with prior convictions is a subject of much debate, what cannot be denied is that allowing most prior convictions to be used solely to impeach a testifying defendant creates a powerful incentive for defendants, both innocent and guilty, to remain silent.\footnote{54} In essence, defendants with a criminal record such pros and cons in deciding whether to testify." (quoting McGautha v. California, 402 U.S. 183, 215 (1971)); McGautha v. California, 402 U.S. 183, 213 (1971) ("It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence," including prior convictions). The Supreme Court of Hawaii holds a contrary view and has ruled that "to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense." State v. Santiago, 492 P.2d 657, 661 (Haw. 1971). A handful of states have adopted Hawaii's approach in generally barring impeachment of testifying defendants with prior convictions. See Dodson, supra note 46, at 51 (citing Hawaii, Pennsylvania, Kansas, Georgia, and Montana as the sole jurisdictions that depart from the federal rule generally permitting such impeachment).

\footnote{52} Portuondo v. Agard, 529 U.S. 61, 73 (2000); id. at 69, 73 (noting that ["w]ith respect to issues of credibility," defendants are treated "the same as other witnesses"); see also Brown v. United States, 356 U.S. 148, 155 (1958) ("If a defendant takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness . . . ."); Fitzpatrick v. United States, 178 U.S. 304, 315 (1900) ("[W]e know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are."); Reagan v. United States, 157 U.S. 301, 305 (1895) (if the defendant chooses to "avail himself of this privilege [to testify], his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. . . . His credibility may be impeached, and by the same methods as are pursued in the case of any other witness.").

\footnote{53} See Loper v. Beto, 405 U.S. 473, 482 n.11 (1972) ("The sharpest and most prejudicial impact of the practice of impeachment by conviction . . . is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand."); Fed. R. Evid. 609(a)(1) (requiring district courts to consider admission of conviction under a more rigorous standard when conviction is that of the accused than for any other trial witnesses).
must choose between their constitutional right to testify and their statutory right to keep prior convictions from coming before the jury.55

B. Cross-Examination With Otherwise Inadmissible Evidence

As the preceding discussion demonstrates, defendants considering whether or not to take the witness stand must ponder not only the likely impact of their testimony on direct examination, but also the impact of cross-examination. This is because "[o]nce a defendant takes the stand, he is 'subject to cross-examination impeaching his credibility just like any other witness.'"56 Thus, when a "defendant places himself at the very heart of the trial process"57 by testifying, the prosecutor will test the defendant's statements through cross-examination, a process famously described as the "'greatest legal engine ever invented for the discovery of truth.'"58 Cross-examination, of course, does not stop with impeachment by prior convictions, and includes as well a vigorous rhetorical challenge to any perceived inconsistencies or inaccuracies in

55. See State v. Santiago, 492 P.2d 657, 660 (Haw. 1971) (recognizing that permitting impeachment with prior convictions, "puts the criminal defendant who has prior convictions in a tremendous dilemma" and "[a]ny defendant who has prior convictions will therefore feel constrained not to take the stand"); United States v. Garber, 471 F.2d 212, 214 (5th Cir. 1972) (emphasizing that the potential of impeachment with prior convictions if the defendant testifies "thrusts the defendant onto the horns of a dilemma"); Hornstein, supra note 46, at 62-63 ("[P]ermitting impeachment by prior conviction is likely to deprive the jury of whatever evidence a defendant might offer on the question of guilt or innocence by compelling the defendant to 'waive' the constitutional right to testify on pain of suffering the prejudice of having the jury learn of his or her criminal past."). That this tradeoff is permitted demonstrates the disfavored status of the right to testify. The Supreme Court would surely never permit the opposite situation—where prior convictions would be admissible only if the defendant did not testify, as this would constitute too great a burden on the right to remain silent. See Carter v. Kentucky, 450 U.S. 288, 305 (1981) (accused must be permitted to "remain silent 'unless he chooses to speak in the unfettered exercise of his own will'") (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

56. Portuondo v. Agard, 529 U.S. 61, 70 (2000) (quoting Jenkins v. Anderson, 447 U.S. 231, 235-36 (1980)). A witness "may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." Mitchell v. United States, 526 U.S. 314, 321 (1999); Brown, 356 U.S. at 155-56 (recognizing that a witness "has no right to set forth to the jury all the facts which tend in his favor without laying his open to a cross-examination upon those facts" and that this rule applies "to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf" (quoting Fitzpatrick, 178 U.S. at 315)); Fitzpatrick, 178 U.S. at 315 ("Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime.").

57. Perry, 488 U.S. at 283 (holding that trial court could instruct defendant not to consult with his counsel during recess in testimony because "'[o]nce the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination'" (quoting United States v. DiLapi, 651 F.2d 140, 152 (2d Cir. 1981) (Mishler, J. concurring))).

the defendant's testimony.

In cross-examining the defendant, the prosecutor has the upper hand. The testifying defendant has a transparent bias in favor of acquittal, and the prosecutor can call upon a vast array of resources to expose any false or misleading testimony—an effort that if successful will likely prove disastrous to the defense cause.59

Adding to the numerous tools available to a prosecutor for cross-examination, the Supreme Court has permitted impeachment of testifying defendants with a wide range of evidence (in addition to prior convictions) otherwise precluded in a criminal trial. One category of such evidence is unlawfully obtained evidence, including: (i) statements obtained in violation of a defendant's Fifth Amendment rights under Miranda v. Arizona;60 (ii) statements obtained in violation of a defendant's Sixth Amendment right to counsel;61 and (iii) physical evidence seized in violation of the defendant's Fourth Amendment rights.62 This evidence, although prohibited in the prosecution's case in chief, is generally admissible (as impeachment) on cross-examination, in rebuttal, or both if, and only if, a defendant testifies.

The Court has recognized that these judicially crafted exceptions to the exclusionary rules—rules that are intended to safeguard the citizenry's constitutional rights by deterring constitutional violations—may detract somewhat from the constitutional principles the rules are meant to uphold. Nevertheless, the Court has held some marginal

59. See James L. Kainen, The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics, 44 STAN. L. REV. 1301, 1354-55 (1992) (contending that "[a]ny suggestion of perjury in any fashion connected to the defense is powerful affirmative proof" and noting that "[c]lassic jury instructions" invite the factfinder to use perjury, falsification of evidence and the like as evidence of consciousness of guilt, i.e., affirmative evidence of guilt); United States v. Clark, 45 F.3d 1247, 1251 (8th Cir. 1995) ("[A]dverse inferences will inevitably be drawn from disbelief of a defendant's trial testimony...."). One advantage the defendant does possess is surprise, in that there is generally no requirement that the defense reveal the defendant's testimony (or even his intention to testify) in advance. This tactical advantage has been called "practically illusory," however, in light of "the government's broad investigatory powers" including the availability of pretrial police interrogation of the accused and potential defense witnesses, and "the requirement in many states that the defenses of alibi and insanity must be specially pleaded." Abraham S. Goldstein, The State And The Accused: Balance Of Advantage In Criminal Procedure, 69 YALE L.J. 1149, 1192 (1960).


61. Michigan v. Harvey, 494 U.S. 344, 351 (1990). The Supreme Court emphasizes that impeachment is allowed because the violation is with respect to a "procedural safeguard" designed to enforce the Sixth Amendment, not the amendment itself. Id. Similarly, "a defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial." New Jersey v. Portash, 440 U.S. 450, 459 (1979).

62. Walder v. United States, 347 U.S. 62, 65 (1954); United States v. Havens, 446 U.S. 620, 627-28 (1980) (holding that even where defendant's direct examination testimony did not directly implicate illegally seized evidence, impeachment was proper as long as the topic was "reasonably suggested by the defendant's direct examination").
deterrence of constitutional violations must be sacrificed to avoid “impairment of the integrity of the factfinding goals of the criminal trial” and the undermining of “the proper functioning of the adversary system” that would occur if a defendant is able to testify without being subject to all available impeachment.63

Further eroding the desirability of testifying in particular cases, courts have also held that the defendant’s appearance on the witness stand also triggers cross-examination with otherwise irrelevant or precluded evidence, such as: (i) the defendant’s prearrest and postarrest silence;64 (ii) the defendant’s failure to testify at a previous trial;65 (iii) the defendant’s testimony at a suppression hearing;66 and (iv) the defendant’s use of his right to testify on his own behalf, and provide himself with a shield against contradiction of his testimony.67

63. Havens, 446 U.S. at 627. The Supreme Court regularly uses a sword/shield analogy: “If a defendant exercises his right to testify on his own behalf,” he is precluded from “‘turn[ing] the illegal method by which evidence in the Government’s possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.” Harvey, 494 U.S. at 351 (quoting Harris v. New York, 401 U.S. 222, 224 (1971)); Walder, 347 U.S. at 65. The Court has emphasized the significance of deterring perjury to justify these rulings, explaining that “[a]ll perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth,” and that “a defendant’s use of [perjured] testimony is so anathetical to our system of justice” that the prosecution must be “permitted . . . to introduce otherwise inadmissible evidence to combat it.” Nix v. Whiteside, 475 U.S. 157, 185 (1986) (emphasis added).

64. While the rules regarding impeachment are clear, the use of prearrest and postarrest silence in the prosecution’s case in chief is the subject of a complex and unsettled jurisprudence. Postarrest silence is constitutionally prohibited in the prosecution’s case in chief if the defendant demonstrates the receipt of Miranda warnings. See Fletcher v. Weir, 455 U.S. 603 (1982); Wainwright v. Greenfield, 474 U.S. 284, 295 (1986) (Florida prosecutor’s use of defendant’s post-arrest Miranda warnings silence as evidence of defendant’s sanity violated due process). There is no clear rule with respect to prearrest silence. See Frank S. Ward, Constitutional Law—United States v. McCann: Is the Fifth Amendment Violated When Pre-arrest Silence Is Used as Substantive Evidence of a Criminal Defendant’s Guilt?, 28 AM. J. TRIAL ADVOC. 269, 269 (2004) (“In the absence of clear direction from the Supreme Court, the federal circuit courts are split on when pre-arrest silence may be used “as substantive evidence of guilt.””). In Jenkins v. Anderson, the Court held that a defendant can be impeached with prearrest silence, but explicitly declined to decide “whether or under what circumstances prearrest silence” could be used in other contexts. 447 U.S. 231, 236 n.2 (1980).

65. Id. at 235; Raffel v. United States, 271 U.S. 494 (1926).

66. Under Simmons v. United States, “when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt.” 390 U.S. 377, 394 (1968). The Court has not determined whether such testimony may be used to impeach a testifying defendant, but this result logically follows from the Court’s other decisions, as a number of courts have recognized. See, e.g., United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991); United States v. Beltran-Gutierrez, 19 F.3d 1287, 1290 (9th Cir. 1994); United States v. Quesada-Rosadal, 685 F.2d 1281, 1283 (11th Cir. 1982). An analogous line of authority prohibits the use of a defendant’s statements establishing financial eligibility for appointed counsel to be used in the prosecution’s case in chief. See United States v. Hardwell 80 F.3d 1471, 1484 (10th Cir. 1996) (reversing conviction where prosecution introduced defendant’s financial eligibility statements to “prove guilt at trial” and recognizing “weight of authority from other circuits” establishing inpermissibility of such use). Presumably such statements would, again, be permissible as impeachment.
defendant’s demeanor during the trial. Finally, impeachment with the otherwise inadmissible evidence noted above has not been limited to direct contradictions of a defendant’s direct examination testimony, but is more generally allowed whenever the subject matter that encompasses the impeachment was “reasonably suggested by the defendant’s direct examination.”

Thus, in addition to creating the potential for impeachment with prior convictions, a defendant who takes the witness stand opens up the trial to illegally seized evidence and otherwise inadmissible evidence such as testimony at a suppression hearing and postarrest silence. Such evidence, while ostensibly admitted solely for impeachment, carries with it substantial risks of additional prejudice if improperly considered by the jury as substantive evidence of guilt. These considerations, of course, function to deter defendants from taking the witness stand by increasing the tactical disadvantages to doing so and decreasing the ultimate weight of any testimony a defendant offers.

67. See Cunningham v. Perini, 655 F.2d 98, 100 (6th Cir. 1981) ("Until a defendant has placed his own demeanor in evidence by taking the stand to testify, his personal appearance at the trial is irrelevant to the question of his guilt or innocence."); United States v. Schuler, 813 F.2d 978, 982 (9th Cir. 1987) (barring prosecutor from making statements regarding defendant’s conduct during trial because “fear of such statements in closing argument, will tend to eviscerate the right to remain silent by forcing the defendant to take the stand in reaction to or in contemplation of the prosecutor’s comments”).

68. Havens, 446 U.S. at 627–28 ("[A] defendant’s statements made in response to proper cross-examination reasonably suggested by the defendant’s direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government’s direct case, or otherwise, as substantive evidence of guilt."). The holding of Havens was the final nail in the coffin of an earlier holding in Agnello v. United States, 269 U.S. 20, 35 (1925), that had suggested that illegally obtained evidence could only be used to impeach a directly contradictory statement uttered on direct examination. See Kainen, supra note 59, at 1368 (advocating “[e]liminating the impeachment exception[s] and returning to Agnello”).

69. The Supreme Court, while recognizing that these rules will enter the defendant’s calculus in determining whether to testify, downplays the resulting dilemma, asserting that a defendant’s decision “not to take the witness stand because of the risk of cross-examination” is merely “a choice of litigation tactics.” Jenkins, 447 U.S. at 238; Ohl v. United States, 529 U.S. 753, 757, 759–60 (2000) (recognizing that the defendant must “take into account the matters which may be brought out on cross-examination” including that he “may be impeached by proof of prior convictions or the like” and stating that “it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify” (quoting McGautha v. California, 402 U.S. 183, 215 (1971))).

In accordance with the case law’s peculiar inclination to burden only the defendant’s testimony, the Supreme Court ruled in James v. Illinois that illegally obtained evidence cannot be used to impeach defense witnesses other than the defendant. 493 U.S. 307, 315 (1990).
C. Trial Courts and Prosecutors May Not Comment Adversely on a Defendant’s Refusal to Testify

In sharp contrast to the meager protections granted to the defendant’s right to testify, the courts have been extraordinarily protective of the right not to testify.\(^{70}\) One of the most significant examples of this robust protection is the preclusion of any adverse judicial or prosecutorial comment on a failure to testify, a relatively recent addition to constitutional law arising from the 1965 Supreme Court decision in *Griffin v. California*.\(^{71}\)

The *Griffin* decision concerned a state murder trial at which the defendant did not testify despite the fact that the evidence placed him in an alley with the victim on the evening of her death. The prosecutor, in summation, made a point of the refusal to testify in light of the defendant’s presumed knowledge of the particulars of the victim’s demise, including, of course, whether he murdered her.\(^{72}\) The prosecutor argued, “[I]n the whole world, if anybody would know, this defendant would know” what happened to the victim, and yet he “has not seen fit to take the stand and deny or explain” the events of that night.\(^{73}\) In accordance with California law, the trial judge then instructed the jury:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify . . . the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.\(^{74}\)

The United States Supreme Court reversed the resulting conviction, concluding that the prosecutor’s argument as buttressed by the trial court’s instruction constituted “a penalty imposed by courts for

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\(^{70}\) As an example of the contrasting treatment, while the Court has vigorously protected a defendant’s freedom to remain silent “‘unless he chooses to speak in the unfettered exercise of his own will,’” it has never suggested that there is a similar freedom to testify “‘unless he chooses to [remain silent] in the unfettered exercise of his own will.’” *Carter v. Kentucky*, 450 U.S. 288, 305 (1981).

\(^{71}\) *380 U.S. 609, 615 (1965)* (stating that the Fifth Amendment precludes “either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt”). *Griffin* was foreshadowed by an 1893 decision, *Wilson v. United States*, 149 U.S. 60 (1893), which held that adverse comment on a defendant’s failure to testify violated a federal statute that provided that a defendant’s failure to testify “shall not create any presumption against him.” *Id.* at 65; see *Griffin*, 380 U.S. at 613.

\(^{72}\) *380 U.S. at 609.*

\(^{73}\) *Id.* at 611.

\(^{74}\) *Id.* at 609.
exercising a constitutional privilege" (the right to remain silent) that unconstitutionally "cuts down on the privilege by making its assertion costly." In reaching this conclusion, the Court acknowledged that "the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is . . . natural and irresistible," but it explained: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." 

As a result of *Griffin*, a prosecutor may no longer argue and a trial court may not instruct that the defendant’s refusal to testify supports any inference of guilt, even in those circumstances where a logical inference to that effect is "natural and irresistible" as it was in *Griffin* itself. By precluding such argument and judicial comment on the grounds that it makes assertion of the privilege "costly," the Supreme Court, by design, rendered a defendant’s silence less "costly," significantly shifting the overall calculus regarding the decision to testify in favor of remaining silent.

**D. A Prosecutor May Comment on a Testifying Defendant’s “Opportunity” to Tailor Testimony**

In contrast to the curtailment of prosecutorial comment on the defendant’s failure to testify, the Supreme Court has heartily endorsed adverse prosecutorial comment on a defendant’s testimony. A prosecutor has, of course, always been free to highlight the defendant’s compelling motive to lie based on an abiding interest in acquittal over conviction. Prosecutors are authorized by the Court’s ruling in

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75. *id. at 614–15.*

76. *id.* Indeed, in a later case that upheld consideration of a prisoner’s silence in the face of accusation as evidence of guilt in prison disciplinary hearings, the Court emphasized that "[s]ilence is often evidence of the most persuasive character." *Baxter v. Palmigiano,* 425 U.S. 308, 319 (1976) (quoting United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153–54 (1923)). The Court also acknowledged in that case that adverse inferences from silence are permitted in civil cases, and attempted to explain the contrary rule in criminal cases on the ground that "[i]n criminal cases, . . . the stakes are higher and the State’s sole interest is to convict." *id. at 318–19.*

77. *Griffin,* 380 U.S. at 614.

78. *Id.* Lerner, *supra* note 4, at 824 (highlighting *Griffin* decision in arguing that "Supreme Court interpretations of our Fifth Amendment help to shield a defendant from the normal consequences of not testifying"). The California Supreme Court had earlier recognized that allowing prosecutorial and judicial comment on the refusal to take the stand "might encourage some defendants to testify to avoid the inferences that may reasonably be drawn from their failure to do so" but concluded that "this encouragement does not amount to the compulsion to testify condemned by the Fifth Amendment." *People v. Modesto,* 398 P.2d 753, 763 (Cal. 1965).

79. See *Reagan v. United States,* 157 U.S. 301, 304 (1895) (recognizing that a defendant’s "deep personal interest . . . in the result of the suit should be considered by the jury in weighing his evidence").
Portuondo v. Agard to also argue opportunity: that "a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony" to that of the other witnesses. Specifically, the prosecutor in Portuondo argued in summation:

You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. . . .

The prosecutor added that this opportunity gives the defendant "a big advantage," to "sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?"

In approving this line of argument, the Court was not troubled that it burdened the defendant's Sixth Amendment right "to be confronted with the witnesses against him" and to consult with counsel during trial, and, as noted by the dissent, thus "transform[ed] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility." The majority argued instead that the prosecutor's argument was "in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" The majority saw "no reason to depart from the practice of treating testifying defendants the same as other witnesses" especially as the prosecutor's comments forwarded "the central function of the trial, which is to discover the truth."

By once again emphasizing the overriding importance to the search for truth of impeaching the defendant's testimony, the Court in Portuondo further decreased the value to a defendant of testifying, and made silence more appealing by comparison.

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81. Id. at 64.
82. Id.
83. See U.S. Const. amend. VI; Geders v. United States, 425 U.S. 80, 91 (1976) (court order that "prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel" was unconstitutional).
84. Portuondo, 529 U.S. at 76 (Ginsburg, J., dissenting).
85. Id. at 69 (quoting Brown v. United States, 356 U.S. 148, 154 (1958)).
86. Id. at 73. There is, of course, some cognitive dissonance in the Court's reliance on the principle that defendants should be treated like any other witness to endorse an argument that the defendant was "'unlike all the other witnesses.'" Id. at 64.
E. Favorable Jury Instructions For Silent Defendants

Almost twenty years after Griffin, the Court shifted the balance of incentives further in favor of remaining silent in resolving a question explicitly left open in that case: whether the federal constitution not only forbids adverse comment on a defendant’s silence, but actually requires some form of favorable judicial comment. In Carter v. Kentucky, the Court answered this question in the affirmative, holding that the Constitution required state and federal trial courts to instruct criminal juries that they must draw “no adverse inference” from a defendant’s failure to testify.

Picking up on its recognition decades earlier that the inference of guilt from a defendant’s failure to testify was quite “natural,” the Supreme Court in Carter recognized that even without adverse prosecutorial or court comment, jurors would nonetheless interpret the defendant’s silence as “‘a clear confession of crime.’” The Court reasoned: “No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.”

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87. In Griffin v. California, the Court “reserve[d] decision on whether an accused can require” as a matter of constitutional law that the jury “be instructed that his silence must be disregarded.” 380 U.S. 609, 615 n.6.

88. Carter v. Kentucky, 450 U.S. 288, 300 (1981) (holding that “the Fifth Amendment requires that a criminal trial judge must give a ‘no-adverse-inference’ jury instruction when requested by a defendant to do so”). The instruction erroneously rejected by the trial court in Carter was as follows: “‘[t]he defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.’” id. at 294.

89. Id. at 301 n.18 (recognizing that “[i]t has been almost universally thought that juries notice a defendant’s failure to testify” and this fact is “inescapably impressed on the jury’s consciousness” and, as the Court had previously acknowledged, the “layman’s natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime” (quoting Lakeside v. Oregon, 435 U.S. 333, 340 n.10 (1978))). Carter was written by Justice Stewart, who had dissented in Griffin, and thus, not surprisingly, echoed one of the key concerns of the Griffin dissent. Griffin, 380 U.S. at 621 (Stewart, J., dissenting) (“How can it be said that the inferences drawn by a jury will be more detrimental to a defendant under the limiting and carefully controlling language of the instruction here involved than would result if the jury were left to roam at large with only its untutored instincts to guide it, to draw from the defendant’s silence broad inferences of guilt?”); see Carter, 450 U.S. at 301 n.7 (citing Griffin dissent); id. at 309 (Rehnquist, J., dissenting) (emphasizing that “[t]he author of the present opinion dissented” in Griffin).

90. Carter, 450 U.S. at 303. As in Griffin, the Court’s ruling was presaged by an earlier case decided on statutory grounds, Bruno v. United States, 308 U.S. 287, 294 (1939). In Bruno, the Supreme Court rejected the contention that “it is a psychological impossibility not to have a presumption arise in the minds of jurors against an accused who fails to testify.” Id. Instead, the Court decided:

Certainly, despite the vast accumulation of psychological data, we have not yet attained that certitude about the human mind which would justify us in disregarding the will of Congress by a dogmatic assumption that jurors, if properly admonished, neither could nor
limit the jurors’ speculation on the meaning of that silence,” like the adverse comment prohibited in *Griffin*, “exact[ed] an impermissible toll on the full and free exercise of the privilege” to remain silent.91

The decision in *Carter* continued the Court’s modern trend of steadily increasing the attractiveness of trial silence. While *Griffin* eliminated the “costly” price that a non-testifying defendant would have to pay by virtue of a court or prosecutor’s adverse comment on the defendant’s silence, *Carter* created an affirmative benefit for the non-testifying defendant, requiring the trial court to instruct the jury to disregard the otherwise “natural” inference that silence indicates guilt.92

### F. Adverse Instructions Regarding Defendant Testimony

In contrast to the now-mandated *Carter* instruction that strengthens the default position of the silent defendant, the standard instructions with respect to a defendant’s testimony undercut the default position of the testifying defendant. These instructions, which vary by circuit, generally inform the jury that a defendant’s testimony is to be viewed with suspicion because of the strong incentive to testify falsely to escape conviction. For example, one such instruction states that the defendant “has a deep personal interest in the result of this prosecution” which “creates, at least potentially, a motive for false testimony.”93 While

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91. *Carter*, 450 U.S. at 305.
92. *Id.* at 301 n.18; Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (“Silence is often evidence of the most persuasive character.” (quoting United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153–54 (1923))).
93. United States v. Gleason, 616 F.2d 2, 15–16 (2d Cir. 1979) (approving instruction and noting that it consists of “the standard language used by district judges for many years”); United States v. Dwyer, 843 F.2d 60, 62 (1st Cir. 1988) (reversing for use of similar instruction that included statement that defendant had “a strong motive to lie,” while noting approval of instruction in *Gleason*); Nelson v. United States, 415 F.2d 483, 487 (5th Cir. 1969) (rejecting challenge to instruction that defendant has a “very keen personal interest . . . in the result of your verdict” and noting that instruction has been “approved numerous times”); United States v. Palmere, 578 F.2d 105, 108 (5th Cir. 1978) (rejecting challenge to “an instruction in which the judge called the jury’s attention to the fact that the defendant had an interest in the outcome of the case”); United States v. Hill, 470 F.2d 361, 363 (1972) (approving jury instruction that “the defendant has a vital interest in the outcome of this trial” and noting that instruction “has been upheld on several occasions”); United States v. Salekto, 452 F.2d 193, 198 (7th Cir. 1971) (noting growing displeasure with jury instruction but nevertheless declining to reverse for use of the instruction); cf. Reagan v. United States, 157 U.S. 301, 304 (1895) (approving instruction that defendant’s “deep personal interest . . . in the result of the suit should be considered by the jury in weighing his evidence”); Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966) (“[W]hen the defendant does take the stand, the jury is charged to consider his interest in the outcome of the trial in assessing his credibility.”).
some courts in recent years have expressed disapproval of such instructions on the grounds that they are unnecessary and “falsely undermine[] the presumption of innocence,” it is by no means clear that they have fallen out of use.\footnote{94} Further, even the courts that have disapproved such instructions support an alternative instruction that a proper consideration in evaluating the defendant’s testimony, like that of any witness, is the defendant’s “interest, bias, or prejudice.”\footnote{95} These instructions, combined with the fact that “[n]othing could be more obvious, and less in need of mention to a jury, than the defendant’s profound interest in the verdict,” undermine the incentive to provide testimony by further devaluing the testimony should it be offered.\footnote{96}

\section*{G. Increased Penalties For Testifying Defendants}

In addition to the increased trial burdens placed on a testifying defendant in terms of additional evidence (and argument) that becomes available to the prosecution when the defendant takes the witness stand and adverse rather than favorable jury instructions, the defendant must also consider an additional and significant burden that attaches when the right to testify is exercised—the potential for an enhanced sentence upon conviction.

Of course, like all witnesses a defendant who testifies falsely under oath is subject to a subsequent perjury prosecution.\footnote{97} The practical


95. Id. at 249 n.8. A related jury instruction, approved by the federal courts, instructs jurors that they may consider the fact that a defendant’s testimony fails to explain or deny acts of an incriminating nature. See Sisco v. Huskey, 73 Fed.Appx. 911, 913 (9th Cir. 2003) (explaining that instruction that jury may consider defendant’s failure to explain acts of an incriminating nature “is fully consistent with established federal law”); McGahee v. Massey, 667 F.2d 1357, 1362 (11th Cir. 1982) (“Our precedent has made it clear ‘that when a defendant voluntarily testifies to the merits, and not just upon a purely collateral matter, the prosecutor may comment upon the defendant’s failure to explain facts already in evidence.’”); Caminetti v. United States, 242 U.S. 470, 494 (1917) (approving jury instruction that allows jury to consider testifying defendant’s failure to deny or explain acts of an incriminating nature).

96. Id. at 248.

97. Under federal law, the crime of perjury occurs when “[a] witness testifying under oath or affirmation . . . gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” United States v. Dunnigan, 507 U.S. 87, 94 (1993); United States v. Havens, 446 U.S. 620, 627 (1980) (noting that a defendant "would unquestionably be subject to a perjury prosecution if he knowingly lies on cross-examination"). All witnesses in federal court must testify under oath or affirmation. FED. R. EVID. 603 (“Before
barriers to such a prosecution in the form of a necessary expenditure of prosecution resources in a separate trial for an offense generally viewed as difficult to prove, make this an unlikely occurrence for any trial witness, including the defendant. Unlike any other witness, however, a defendant who is perceived to have testified falsely is amenable to a more realistic and immediate punishment. Under the federal sentencing guidelines, a defendant’s false testimony at trial constitutes a basis for a recommended two-level sentencing enhancement for obstructing justice, a codification of a generally accepted practice of enhancing a sentence based on trial testimony perceived to be false. The Supreme Court has endorsed this sentencing practice, stating, “It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency” as compared “with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury.”

The Supreme Court has repeatedly rejected the contention that punishing the accused for contesting guilt impermissibly burdens the testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”); Dunnigan, 507 U.S. at 97 (“The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat. All testimony, from third-party witnesses and the accused, has greater value because of the witness’ oath and the obligations or penalties attendant to it.”).

98. See Chris William Sanchirico, Evidence Tampering, 53 DUKE L.J. 1215, 1243 (2004) (reporting that only 0.2 % of convictions in federal system and in California courts are for perjury); Robert G. Morvillo & Christopher J. Morvillo, Untangling the Web: Defending a Perjury Case, LITIGATION, Winter 2007, at 8, 8 (noting that in 2003, almost twice as many defendants were prosecuted in district court for violations of migratory bird laws (167) than for perjury (88)); Stuart P. Green, Uncovering the Cover-Up Crimes, 42 AM. CRIM. L. REV. 9, 42 (2005) (“Most commentators agree that perjury and obstruction of justice occur quite commonly in our criminal justice system, though prosecutions for such offenses are comparatively rare.”); Kevin C. McMunigal & Calvin William Sharpe, Reforming Extrinsic Impeachment, 33 CONN. L. REV. 363, 379 (2001) (“[L]awyer and witness may nonetheless be deterred from attempting . . . perjury by the possibility of a separate criminal prosecution for perjury, though such prosecutions are rare.”); Alschuler, supra note 4, at 2668 (recognizing “de facto exemption” from perjury laws usually applied to criminal defendants); Michael Stokes Paulsen, Dirty Harry and the Real Constitution, 64 U. CHI. L. REV. 1457, 1489 (1997) (“perjury is notoriously difficult to prove” and “the ethos of today is that perjury is commonplace—almost expected and tolerated, it seems—from criminal defendants”).

99. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2007) (“Obstructing or Impeding the Administration of Justice”); Dunnigan, 507 U.S. at 98 (“Upon a proper determination that the accused has committed perjury at trial, an enhancement of sentence is required by the Sentencing Guidelines. That requirement is consistent with our precedents and is not in contravention of the privilege of an accused to testify in her own behalf”); United States v. Booker, 543 U.S. 220, 245–46 (2005) (rendering sentencing guidelines “effectively advisory”). Prior to the enactment of the sentencing guidelines, the Supreme Court had held that a trial court could permissibly enhance a sentence based on its own finding that the defendant testified falsely at trial. See United States v. Grayson, 438 U.S. 41, 54 (1978).

100. Dunnigan, 507 U.S. at 97–98; see also Grayson, 438 U.S. at 54.
right to testify. Instead, the Court asserts "[a]wareness" of the potential for an enhanced sentence based on perceived false testimony "realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf." With respect to the federal sentencing guideline enhancement, the Court has also specifically (if somewhat facilely) explained that a defendant "cannot contend that increasing her sentence because of her perjury interferes with her right to testify, for we have held on a number of occasions that a defendant's right to testify does not include a right to commit perjury."

The Fourth Circuit decision that was reversed by the Supreme Court in reaching the above conclusion provides a counterpoint to the Court's reasoning. In a lengthy exposition that candidly recognized the "human infirmities" that can subvert the criminal trial process, the Fourth Circuit ruled that the enhancement for testimony perceived to be false constituted "an intolerable burden upon the defendant's right to testify in his own behalf." The court stated that in light of the government's contention that "every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement," the "enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him." The court added, "It disturbs us that testimony by an accused in his own defense, so basic to justice, is deemed to 'obstruct' justice unless the accused convinces the jury."

Whether or not one accepts the Supreme Court's response to the Fourth Circuit's analysis, the fact remains that it cannot be lost on defendants—even innocent ones—that if they sit silently through the presentation of evidence, relying on counsel to speak for them, they are amenable to no increased penalty. In effect, trial silence, if contrasted with an unsuccessful effort at claiming innocence through testimony, can be predicted to result in an effective two-level decrease under the

102. Dunnigan, 507 U.S. at 96. The Supreme Court's arguments were anticipated in the Fourth Circuit, where that court decried "[t]he facile logic of hindsight" that "deems such disbelieved testimony a lie" and proposes that "inasmuch as there is no right to lie, there is no harm in sanctioning it." United States v. Dunnigan, 944 F.2d 178, 183 (4th Cir. 1991), rev'd, 507 U.S. 87 (1993).
103. Dunnigan, 944 F.2d at 185.
104. Id. at 183; Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969) (stating that a determination of whether a defendant testified falsely constituted "an unpromising test of his prospects for rehabilitation if guilty" and that "[t]o allow the trial judge to impose still further punishment because he too disbelieves the defendant would needlessly discourage the accused from testifying in his own behalf"). Justice Stewart dissenting in Grayson emphasized that the Court's holding amounted to a conclusion that "whenever a defendant testifies in his own behalf and is found guilty, he opens himself to the possibility of an enhanced sentence." Grayson, 438 U.S. at 56.
sentencing guidelines, roughly equivalent to the sentencing advantage gained by pleading guilty.\textsuperscript{105} Thus, the fact that a testifying defendant faces not only speculative perjury charges but also the likelihood of a sentencing enhancement if convicted constitutes a powerful disincentive to testify. As the Supreme Court has stated with ominous overtones for defendants deciding whether to take the witness stand, "We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences."\textsuperscript{106}

IV. AN ALTERNATIVE INCENTIVE SCHEME

Given the severe imbalance created by the numerous legal incentives to remain silent and disincentives to testify described in the preceding sections, it is not surprising that a large percentage of criminal defendants decline to take the witness stand.\textsuperscript{107} What is surprising is that this legal framework, which is neither required by the Constitution nor beneficial to the workings of criminal justice, has arisen at all. Indeed, the only readily apparent beneficiaries of the current system are a small subset of guilty defendants who would have no interest in testifying under any legal regime and who are able to pool with an artificially inflated number of innocent defendants now deterred from testifying.\textsuperscript{108}

\textsuperscript{105} See U.S. Sentencing Guidelines Manual § 3E1.1(a) (2007) ("Acceptance of Responsibility"); see Dunnigan, 944 F.2d at 184 n.5 (recognizing the strength of the enhancement for false testimony, increasing the guidelines range in that case "from 41--51 to 51--63 months" and "at the highest offense levels, the increase is more drastic, from 292--365 months to 360--life").

\textsuperscript{106} United States v. Havens, 446 U.S. 620, 626 (1980) (emphasis added). In a related vein, the Supreme Court has also held that "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury" and, in fact, "A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment." Nix v. Whiteside, 475 U.S. 157, 173 (1986); Grayson, 438 U.S. at 54 ("Counsel ethically cannot assist his client in presenting what the attorney has reason to believe is false testimony."). Thus, defense counsel too is faced with potential adverse consequences should the defendant testify. These consequences are, of course, wiped away if the defendant instead exercises his right to remain silent. Granting defense counsel an independent incentive to silence one's client is particularly significant given that counsel is the primary mechanism for informing the defendant of the advantages and disadvantages of testifying. Natapoff, supra note 1, at 1469--70 (contending that defense counsel are the "most immediate engine of a defendant's silence" and often operate as "professional silencers"); Lerner, supra note 4, at 827 (reporting that in French system, the defendant is not placed under oath at trial and "[i]t is permissible to advise the defendant to lie, and in fact defense lawyers in France sometimes recommend it on certain points").

\textsuperscript{107} See Gordon Van Kessel, Adversary Excesses in the American Criminal Trial, 67 Notre Dame L. Rev. 403, 482 (1992) (recognizing that American criminal procedural rules "often operate to strongly discourage the defendant from taking the stand"); see also sources cited supra note 1.

\textsuperscript{108} It has been argued that the Griffin jurisprudence actually helps juries "to distinguish the guilty from the innocent by inducing an anti-pooling effect that enhances the credibility of innocent
To the extent defendants are deterred from taking the witness stand by the patchwork of rules described in the preceding section, both the defendants and the criminal justice system suffer. Defendants suffer by being forced to relinquish their right to speak on their own behalf. The justice system suffers because it is deprived of the information defendants would provide, either willingly through truthful testimony or unwittingly through false testimony. To the extent prosecutors have an interest that is distinct from that of the criminal justice system generally, they too suffer because they are deprived of the chance to cross-examine the defendant, an event that from an able prosecutor’s perspective should serve to help demonstrate guilt by revealing a guilty defendant’s lies.

In sum, there is little reason to adhere to the numerous aspects of the current criminal trial system that not only permit but encourage an incomplete presentation of facts to the jury. This is especially so because this system is compelled neither by constitutional law nor historical precedent, but would in fact be completely unrecognizable to the drafters of the Constitution.

In light of the foregoing, this Article next presents two alternative reforms to the status quo that would encourage more defendants to testify by eliminating or at least limiting the artificial inducements to remaining silent at trial. First, the Article suggests the more obvious solution—reforming the current system by simply eliminating the legal rules that reward defendants for remaining silent and punish them for testifying. As these legal rules serve little purpose other than to discourage testimony, the reform could be accomplished without any significant collateral consequences. Second, the Article proposes a more incremental solution that (if embraced by district courts) would accomplish much of the intended result: a formal in limine procedure

suspects” because “the right to silence affords a guilty suspect an attractive alternative to imitating an innocent suspect through lies.” Daniel J. Seidmann & Alex Stein, The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege, 114 HARV. L. REV. 430, 433 (2000). This analysis, which narrowly focuses on the right to remain silent, is incomplete. A broader perspective that examines both the advantages of remaining silent and disadvantages of testifying, reveals that trial silence has been made artificially attractive to both the guilty and innocent. Further, the resulting pooling in silence is significantly more damaging to the reliability of trial outcomes because there are no mechanisms to distinguish innocent silence from guilty silence; silence is silence. When guilty and innocent defendants pool by testifying, however, they can be readily distinguished through the tools of the adversary process, e.g., cross-examination, rebuttal witnesses, etc. Cf. Van Kessel, supra note 1, at 986-87 (criticizing Seidmann & Stein, supra, because “in the real word of the American criminal process, only a very few innocents likely benefit from the general ‘anti-pooling’ effect of the guilty who exercise their right to silence”); Friedman, supra note 10, at 673 (criticizing argument that allowing character impeachment helps to sort out innocent from guilty defendants because “[i]t is by no means clear that a guilty defendant subject to character impeachment is at all more likely than an innocent one to stay off the stand because of the rule” permitting impeachment).
whereby a criminal defendant could involve the trial court in structuring an alternative set of legal rules designed to elicit the defendant's testimony in a particular case. Each of these proposals is intended to accomplish the goal of increasing the percentage of defendants who testify without significantly altering the existing balance of power between defendants and the prosecution.

A. Reform Alternative No. 1: Alter the Existing Framework

The most direct means of altering the status quo to encourage a greater percentage of criminal defendants to testify is to simply eliminate the pronounced bias in favor of trial silence that exists under the current criminal trial framework. By decreasing the benefits that accrue to silent defendants and eliminating the penalties that apply when defendants testify, such a change could, in fact, reverse the existing imbalance and induce a far greater percentage of defendants to testify. This reform could be implemented with minimal disruption to the overall functioning of the criminal justice system as there is a great deal of low hanging fruit, i.e., legal rules that penalize testimony or reward silence, or both, that serve little other purpose. With one possible exception (noted below), this proposal could be implemented by enacting a new Federal Rule of Evidence consisting of the following five subrules that would, in concert, reverse the existing anti-testimonial bias of the rules governing criminal trials.109

Subrule 1: Restrict impeachment of a criminal defendant’s testimony with evidence not admissible in the prosecution’s case in chief.

This first subrule would eliminate the primary tactical advantage that accompanies trial silence by making the evidence that will be admissible at trial substantially the same whether or not the defendant testifies. This could be accomplished in either of two ways: (i) permitting the use of traditional impeachment-only evidence (illegally obtained evidence, prior convictions, etc.) as substantive evidence in the prosecution’s case in chief; or (ii) prohibiting the use of such evidence altogether. Given

the numerous constitutional obstacles to the former course,\textsuperscript{110} the latter seems preferable.

Under the latter course, the prosecution would no longer be able to impeach a defendant’s credibility with prior convictions, eliminating the strongest disincentive to defendant testimony. The prosecution would also be generally precluded from using illegally obtained evidence and items such as a defendant’s suppression hearing testimony for impeachment.

The prosecution would still be permitted, however, to impeach the defendant with prior convictions, illegally obtained evidence, or analogous evidence in one narrow circumstance: if that evidence \textit{directly contradicts} a statement made by the defendant on the witness stand. For example, if the defendant claims to have never been convicted of a crime, the prosecution should be able to impeach that testimony with a prior conviction; or if the defendant claims not to have been carrying drugs when arrested, the prosecution could impeach that testimony with drugs located in an unlawful search.\textsuperscript{111} Apart from this narrow circumstance, however, such evidence would remain inadmissible even if it would serve to \textit{indirectly} undermine a defendant’s direct examination testimony or impeach the defendant’s general credibility as a witness.\textsuperscript{112}

In fact, the Supreme Court had at one point similarly suggested that

\begin{itemize}
\item[\textsuperscript{110}]
See supra note 43 and accompanying text (explaining potential that prior conviction propensity evidence could violate due process or fair trial rights) as well as cases such as \textit{Miranda v. Arizona}, 384 U.S. 436 (1966), and \textit{Mapp v. Ohio}, 367 U.S. 643, 647, 657 (1961), that compel exclusion of unlawfully obtained evidence in the prosecution’s case in chief. See \textit{also} Simmons v. United States, 390 U.S. 377, 394 (1968) (mandating exclusion of defendant’s suppression hearing testimony as evidence in prosecution’s case in chief at trial).

\item[\textsuperscript{111}]
Under this subrule, the defendant could comfortably testify to his innocence of the charged offense without opening the door to otherwise inadmissible evidence by avoiding such statements on direct examination. The prosecutor would then be unable under existing case law to subsequently attempt on cross-examination to “open the door” to the inadmissible evidence by eliciting a directly contradictory statement. See \textit{United States v. Webster}, 734 F.2d 1191, 1192 (7th Cir. 1984) (holding that “impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible” and noting that this rule “has been accepted in all circuits that have considered the issue” (quoting \textit{United States v. Morlang}, 531 F.2d 183, 190 (4th Cir. 1975))); \textit{United States v. Peterman}, 841 F.2d 1474, 1479 (10th Cir. 1988) (stating that “impeachment” is not permitted where it is employed “as a guise for submitting to the jury substantive evidence that is otherwise unavailable” (quoting \textit{United States v. Silverstein}, 737 F.2d 864, 868 (10th Cir. 1984))); \textit{United States v. Gilbert}, 57 F.3d 709, 711 (9th Cir. 1995) (“[T]he government must not knowingly elicit testimony from a witness in order to impeach him with otherwise inadmissible testimony.” (quoting \textit{United States v. Gomez-Gallardo}, 915 F.2d 533, 533 (9th Cir. 1990))).

\item[\textsuperscript{112}]
The provision (subrule I) would preclude the presentation of evidence such as that described in subparts III.A&B, \textit{supra}, but would not otherwise alter the prosecution’s ability to sponsor rebuttal evidence intended to undermine the defendant’s factual testimony, such as a witness who could debunk a defendant’s alibi.
\end{itemize}
impeachment, at least with respect to illegally obtained evidence, should be limited to circumstances where the evidence impeaches a directly contradictory statement uttered by the defendant on direct examination. The Court justified this limitation on the ground that a defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." In *Agnello v. United States*, the Court applied this principle, holding that a defendant's testimony that he received packages of drugs without knowing their contents and had never "seen narcotics" could not be impeached with an illegally seized can of cocaine found in his bedroom. The reform proposed here picks up this later discarded strand of Supreme Court case law, allowing defendants the freedom to testify without thereby granting the prosecution license to introduce all manner of otherwise inadmissible evidence on the heels of that testimony.

While appearing somewhat favorable to the defense, this subrule would do little to alter the jury's overall perception of a defendant's testimony—the ostensible purpose of the foregone impeachment. This is because impeachment of a testifying defendant with extrinsic

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113. *Walder v. United States*, 347 U.S. 62, 65 (1954) (in prosecution for sale of narcotics, where "defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics," his testimony could be impeached with illegally obtained evidence of heroin taken from his home and in his presence).

114. 269 U.S. 20 (1925). *Agnello* was severely limited in later cases. See United States v. Havens, 446 U.S. 620, 624 (1980); infra note 115 and accompanying text.

115. 269 U.S. at 29–30; *Walder*, 347 U.S. at 66 (recognizing that *Agnello* "foreshadowed, perhaps unwittingly, the result we reach today"). The Court later rejected this path, however,retreating from any suggestion that impeachment of a defendant was limited except by the general rules governing the proper scope of cross-examination. The now-extant rule merely restates the constraint generally applicable to all cross-examination—"inquiry is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness." FED. R. EVID. 611(b). See *Havens*, 446 U.S. at 627 (stating that use of illegally seized evidence for impeachment is permitted whenever an inquiry supported by that evidence is "plainly within the scope of the defendant's direct examination"); James v. Illinois, 493 U.S. 307, 312–13 (1990) ("[I]n *United States v. Havens*, . . . the Court expanded the exception to permit prosecutors to introduce illegally obtained evidence in order to impeach a defendant's 'answers to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination.'" (quoting *Havens*, 446 U.S. at 627)); United States v. Leon, 468 U.S. 897, 910 (1984) ("Evidence inadmissible in the prosecution's case in chief or otherwise as substantive evidence of guilt may be used to impeach statements made by a defendant in response to 'proper cross-examination reasonably suggested by the defendant's direct examination.'" (quoting *Havens*, 446 U.S. at 627–28)). This limitation, in fact, attains a constitutional dimension in this context as courts have recognized the scope of the defendant's Fifth Amendment waiver in taking the witness stand to be "coextensive with the scope of relevant cross-examination." *Brown v. United States*, 356 U.S. 148, 154–55 (1958) (ruling that when a defendant takes the stand, "the breadth of [a defendant's Fifth Amendment] waiver is determined by the scope of relevant cross-examination"); United States v. Black, 767 F.2d 1334, 1341 (9th Cir. 1985) (same).
evidence as would be excluded by this proposal is singularly unnecessary. Unlike any other witness, "[a] testifying defendant's credibility is impeached by his interest in the trial's outcome even before he utters a word." 116 Not only is every defendant subject to this form of impeachment, but the impeachment is quite powerful. Juries, who generally have little sympathy for persons charged with crime, are well aware that defendants have a strong incentive to shade their testimony to favor acquittal. Consequently, the need for additional credibility impeachment of any particular defendant's testimony is generally minimal. 117

Further, to the extent that impeachment evidence excluded under this proposal would influence a jury's verdict, the influence likely would be legally improper—e.g., an inference of guilt as opposed to an inference of non-credibility based on prior criminal conduct or illegally obtained evidence. 118 The elimination of the potential for juries to use

116. Kainen, supra note 59, at 1313; United States v. Gaines, 457 F.3d 238, 248 (2d Cir. 2006) ("Nothing could be more obvious, and less in need of mention to a jury, than the defendant's profound interest in the verdict."); Hornstein, supra note 46, at 62 ("[W]hatever probative value prior conviction evidence may have on the believability of a defendant's testimony, it is likely to pale in the face of the defendant's obvious interest in the outcome of the case, an interest that will cause the jury to be cautious in its assessment of the defendant's testimony."); Michael E. Antonio & Nicole E. Arone, Damned If They Do, Damned If They Don't: Jurors' Reaction to Defendant Testimony or Silence During a Capital Trial, 89 JUDICATURE 60, 66 (2005) (reporting results of juror interviews that showed that jurors generally view defendant testimony as not trustworthy); Dodson, supra note 46, at 49-50 ("[T]he defendant's credibility is already so much lower than that of the other witnesses (because it obviously is in the defendant's self-interest to give testimony which favors his or her position) that the admission of prior convictions does not reduce the credibility of the defendant further." (quoting Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions When Jurors Use Prior Conviction Evidence to Decide Guilt, 9 LAW & HUM. BEHAV. 37, 47 (1985)); cf. Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966) ("One need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record. What greater incentive is there than the avoidance of conviction? We can expect jurors to be naturally wary of the defendant's testimony, even though they may be unaware of his past conduct.").

117. As Hawaii's highest court has explained, impeachment with prior convictions is "of little real assistance to the jury in its determination of whether the defendant's testimony as a witness is credible" because "every criminal defendant may be under great pressure to lie" to avoid conviction. State v. Santiago, 492 P.2d 657, 661 (Haw. 1971). "Furthermore, since the jury is presumably qualified to determine whether or not a witness is lying from his demeanor and his reaction to probing cross-examination, there would appear to be little need for evidence of prior convictions. . . ." Id.; see 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6134 (1993) ("Conviction evidence offered against an accused often will have little probative value. This is because the evidence will not add much to the jurors' evaluation of credibility since it tells them nothing they do not already know; the defendant is an interested witness who, if guilty, probably would not hesitate to commit another crime like perjury to save his skin."); Friedman, supra note 10, at 659 ("[A] rational jury usually will conclude, even without character impeachment, that the accused has a strong interest in lying and little compunction against doing so" and consequently "[c]haracter impeachment evidence is overkill.").

118. See Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967) ("The impact of criminal convictions will often be damaging to an accused and it is admittedly difficult to restrict its impact, by
impeachment evidence as improper evidence of substantive guilt is a positive collateral effect of the proposal.

Subrule 2: Provide that a defendant’s sentence may not be enhanced based on a finding that he testified falsely

The second subrule would eliminate the disincentive to testifying created by the prospect that disbelieved testimony will be used to enhance the defendant’s sentence upon conviction. Again, the prosecution would lose little by virtue of this provision. Trial courts have broad sentencing discretion, and are likely to impose substantially similar (if marginally lower) sentences, particularly in more serious cases, even if unable to resort to a specific enhancement for perceived false testimony. The subrule would simply decouple the district court’s sentencing decision from the defendant’s decision to take the witness stand, leaving the court with numerous alternative considerations from which to shape an appropriate sentence.

As this subrule does not preclude a defendant, like any other witness, from being prosecuted in a subsequent perjury proceeding, the proposal neither grants the defendant “a right to commit perjury,” nor does it require the defendant to testify without being placed under oath.

Subrule 3: Prohibit jury instructions and prosecutorial comment that single out the defendant’s testimony

The third subrule would eliminate jury instructions such as those discussed in subpart III.E, supra, that emphasize that the defendant has a particularly powerful incentive to testify falsely. This is in line with the current trend in the case law that suggests such instructions are cautious instructions, to the issue of credibility.

119. The sentencing judge’s discretion is broader now in this respect than it was prior to United States v. Booker, which rendered the Sentencing Guidelines advisory rather than mandatory. 543 U.S. 220, 245-46 (2005).

unnecessary and potentially unconstitutional.\footnote{121} Courts could still instruct jurors that they could consider any witness’s bias or interest in evaluating the witness’s testimony, as long as the defendant is not singled out as particularly suspect. Again, enactment of this provision is unlikely to produce any significant advantage for the defense in a criminal case as jurors are well aware of the defendant’s interest in the outcome and need no instruction on that score.\footnote{122} Along these same lines, this subrule would also prohibit prosecutorial argument, such as that endorsed in Portuondo,\footnote{123} that focuses on defendants’ unique opportunity to observe the trial testimony and tailor their testimony to that of the other witnesses. Such comment is again unnecessary as the point is patently obvious and serves primarily to overpersuade the jury by suggesting that defendant testimony should be summarily discarded. Thus, to the extent such argument has any broad effect on criminal trials, the effect is an undesirable one—to deter defendants from offering their testimony at all.

Subrule 4: Permit circumscribed “adverse comment” on a defendant’s refusal to take the stand

One of the most powerful inducements to defendant silence in the existing criminal trial system is the trial court’s affirmative obligation to neutralize the otherwise “natural” negative consequences of declining to take the witness stand.\footnote{124} This obligation is crystallized in the trial context in the holdings of \textit{Griffin v. California} and \textit{Carter v. Kentucky}, discussed in subparts III.C, E, \textit{supra}, which prohibit adverse comment on the defendant’s silence and require trial courts to instruct juries not to consider that silence for any purpose.

A key rationale underlying the \textit{Griffin} and \textit{Carter} decisions is that an inference of guilt from silence is often unwarranted because defendants may decline to testify for tactical reasons having nothing to do with guilt or innocence. In fact, the Supreme Court in both \textit{Griffin} and \textit{Carter} specifically emphasized the possibility that an innocent defendant would decline to testify in order to preclude the introduction of prior convictions, a possibility that is eliminated by the proposed reforms.\footnote{125}

\begin{footnotes}
\item[121] See cases cited \textit{supra} note 93.
\item[122] United States v. Gaines, 457 F.3d 238, 248 (2d Cir. 2006) (“Nothing could be more obvious, and less in need of mention to a jury, than the defendant’s profound interest in the verdict”); see also sources cited \textit{supra} note 116.
\item[123] See \textit{supra} Part III.D.
\item[125] The \textit{Griffin} court stated that an inference of guilt based on a defendant’s failure to testify was
By directly undermining one of its key rationales, subrules one through three lay the groundwork for the Griffin and Carter regime to be revisited, and the pre-Griffin situation of "carefully circumscribed" comment on a defendant's failure to testify reinstated in subrule four. Significantly, Griffin need not be overruled to achieve this outcome, but merely limited to the circumstances then present—where numerous tactical considerations unknown to juries (primarily, impeachment with prior convictions) invalidated any otherwise natural inference that a defendant's refusal to testify indicated consciousness of guilt. Revisiting the rule of Griffin, and its logical expansion in Carter, is also supported by the widespread recognition of Griffin's questionable historical and constitutional underpinnings.

not necessarily appropriate because ""the defendant might fear that his prior convictions will prejudice the jury,"" and thus ""another possible inference can be drawn from his refusal to take the stand."" Griffin, 380 U.S. 609, 615 (1965) (quoting People v. Modesto, 398 P.2d 753, 763 (Cal. 1965)). In Carter, the court again highlighted the ""fear of impeachment by prior convictions"" among a handful of potential reasons unrelated to guilt that a defendant could be dissuaded from testifying. Carter, 450 U.S. at 300 n.15. The Court identified such impeachment as ""the petitioner's fear in the present case"" and quoted extensively from the defense counsel's discussion with his client in the trial court, in which: ""Counsel ... explained to the petitioner that if he testified the Commonwealth could ""use the fact that you have several offenses on your record ... [to] impeach your ... propensity to tell the truth ...."" and counsel ""added that in his experience this was 'a heavy thing; it is very serious, and I think juries take it very seriously . . . .""' Id. at 293; Friedman, supra note 10, at 680 (arguing for elimination of rule allowing impeachment of testifying defendants with prior convictions and recognizing that ""a consequence"" of such a change may be ""to cut down the main rationale underlying Griffin").


127. Griffin was criticized immediately on the ground that adverse comment on a defendant's silence involves no compulsion, which previous cases had held was ""a necessary element of [the] compulsory self-incrimination"" prohibited by the Fifth Amendment. Hoffa v. United States, 385 U.S. 293, 304 (1966); see also Griffin, 380 U.S. at 620 (Stewart, J., dissenting) (""The Court in this case stretches the concept of compulsion beyond all reasonable bounds, . . ."). Griffin continues to be frowned upon by past and present Justices. See Mitchell v. United States, 526 U.S. 314, 331-36 (1999) (Scalia, J., dissenting, joined by Rehnquist, C.J., Thomas, J., O'Connor, J.) (criticizing Griffin as a ""wrong turn"" lacking constitutional or historical support); see also Friendly, supra note 33, at 700 (1968) (arguing that Griffin ""gave inadequate weight to the language of the amendment that testimony must be 'compelled'""; cf. Michael Steven Green, The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms, 52 DUKE L.J. 113, 133-34 (2002) (Fifth Amendment jurisprudence ""is universally recognized to be a hopeless muddle—'an inconsistent combination of difficult-to-justify broad rules and a hodgepodge of miscellaneous exceptions'"" and concluding that ""judicial attempts to determine its scope in a principled fashion cannot succeed"). While the case is not likely to be overruled, see Mitchell, 526 U.S. at 343 (no other Justice joined Justice Thomas's dissent stating that ""I would be willing to reconsider Griffin and Carter in the appropriate case""), it is quite possible that the Justices would accept a limitation of Griffin as described above. Indeed, since Griffin, the Court has held that a prisoner's silence in the face of accusation can be used as evidence of guilt in prison disciplinary hearings on the ground that ""silence is often evidence of the most persuasive character,"" Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (quoting United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923)), and in an earlier plurality opinion addressing solely constitutional rights contained in the Fourteenth Amendment stated that:

It seems quite natural that when a defendant has opportunity to deny or explain facts and
Comment permitted under the pre-Griffin California rule was, in its time, sanctioned by "[t]he Model Code of Evidence, and the Uniform Rules of Evidence," "endorsed by resolution of the American Bar Association and the American Law Institute, and [had] the support of the weight of scholarly opinion." The rule permitted either comment or instruction only with respect to facts that were within the defendant's "power" to explain or deny, and did not permit the defendant's lack of testimony to substitute for a failure of proof of any element of the prosecutor's case. These limits could be reinstated in the form of a jury instruction analogous to that employed by the California courts prior to Griffin. Returning to a pre-Griffin world, where defendants could not hide behind Carter's "no adverse inference" instruction and were subject to circumscribed prosecutorial comment and judicial instruction regarding trial silence, would go a long way toward reversing the anti-testimonial thrust of the existing criminal trial rules by determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it. In that case a failure to explain would point to an inability to explain.


128. Griffin, 380 U.S. at 622 (Stewart, J., dissenting); Lakeside v. Oregon, 435 U.S. 333, 337 n.5 (1978) (recognizing that the practice disapproved in Griffin "at one time ... enjoyed the approval of the American Law Institute and the American Bar Association" and that "instructions similar to those at issue in Griffin had been sanctioned by the Model Code of Evidence and the Uniform Rules of Evidence"); see also Alschuler, supra note 4, at 2667 (recognizing that English law currently "authorizes judges and jurors to draw . . . adverse inferences" from defendant silence "in many situations"). California's comment rule was adopted as an amendment to the California Constitution in 1934 "following studies made by the American Law Institute and the American Bar Association" and reversed the then-existing rule that no such comment was allowed. People v. Adamson, 165 P.2d 3, 7 (Cal. 1946), aff'd, 332 U.S. 46 (1947). The amendment stated:

No person shall . . . be compelled, in any criminal case, to be a witness against himself . . . but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.

Modesto, 398 P.2d at 759 n.1. In applying the provision, the California courts limited the adverse comment permitted, emphasizing that the defendant’s failure to testify could, at most, support an inference that the prosecutor’s evidence on a point within the defendant’s knowledge was sound, but could not itself substitute for a failure of proof of any element of the prosecutor’s case. Adamson, 165 P.2d at 9-10.

129. Id.

130. Any residual unfairness caused by altering the rule of Griffin could perhaps be mitigated by a procedure permitting the defense to rebut an adverse inference based on a defendant’s silence by introducing evidence or argument regarding reasons consistent with innocence that the defendant declined to testify, such as extreme nervousness, difficulty with public speaking, etc.
resurrecting a powerful incentive to testify at trial.\textsuperscript{131}

Subrule 5: Require trial courts to ensure that a non-testifying defendant has voluntarily and knowingly waived the right to testify

Currently, the federal system has no requirement that trial courts insure that defendants are made aware of their right to testify.\textsuperscript{132} By having the court inquire into the defendant’s voluntary waiver of the right to testify, this subrule will guarantee that when defendants forego that right they do so knowingly and voluntarily. To minimize the number of defendants who fail to testify because of a misapprehension of the scope of their rights, the trial court could ensure in a short, formal colloquy that defendants who intend to remain silent at trial correctly perceive the basic legal advantages and disadvantages of testimony—e.g., impeachment with prior convictions, \textit{Griffin} and \textit{Carter} protections—a colloquy that would be particularly important given the broad changes in these tactical considerations that would result if this Article’s proposals were adopted.

\textbf{B. Reform Alternative No. 2: Bargaining Around the Default Framework Through In Limine Motions}

The relatively sweeping proposals summarized in the preceding section, while certainly the most effective method of encouraging defendant testimony, are not the only viable means to that end. In fact, a similar result could be achieved without any significant changes to existing criminal trial rules. Under this alternative proposal, detailed

\textsuperscript{131} See \textit{Modesto}, 398 P.2d at 763 (recognizing that permitting comment on the defendant’s refusal to testify “might encourage some defendants to testify to avoid the inferences that may reasonably be drawn from their failure to do so” but concluding that “this encouragement does not amount to the compulsion to testify condemned by the Fifth Amendment”).

\textsuperscript{132} See \textit{Owens} v. United States, 483 F.3d 48, 58 (1st Cir. 2007) (“A lawyer plays the primary role in advising his client of the right to testify; a trial judge is not required to apprise a defendant of his right to testify or inquire whether he has waived it.”); \textit{Brown} v. \textit{Artuz}, 124 F.3d 73, 79 (2d Cir. 1997) (“We agree with those courts that place no general obligation on the trial court to inform a defendant of the right to testify and ascertain whether the defendant wishes to waive that right.”); \textit{United States} v. \textit{Janoe}, 720 F.2d 1156, 1161 (10th Cir. 1983) (“[T]here is no constitutional or statutory mandate that a trial court inquire further into a defendant’s decision not to testify . . . .”); Timothy P. O’Neill, \textit{Vindicating the Defendant’s Constitutional Right to Testify at Criminal Trial: The Need for an On-the-Record Waiver}, 51 U. Pittsburgh L. Rev. 809, 839 (1990) (arguing that “[i]t is imperative that American jurisdictions . . . institute a mechanism” requiring that defendants be informed of their “constitutional right to testify”). State courts do not all follow the federal law on this point. See, e.g., \textit{LaVigne} v. \textit{State}, 812 P.2d 217, 222 (Alaska 1991) (“[J]udges should make an on-the-record inquiry after the close of the defendant’s case, although out of the jury’s hearing, into whether a non-testifying defendant understands and voluntarily waives his right.”).
below, a defendant who would testify but for some legal rule or rules rendering that decision too “costly” could file an in limine motion\textsuperscript{133} seeking an exception to the implicated rule or rules that, if granted, would result in the defendant testifying. While a rudimentary form of such motions is already utilized to obtain a pretrial ruling on the admissibility of prior conviction impeachment, this proposal would significantly alter the existing motion practice in both substantive and procedural ways.

As an initial matter, the proposed motion would be substantively more robust than the current species of in limine motions by virtue of an expanded scope. In filing the motion, the defense could seek to preclude any potential impeachment-only evidence, and propose alterations to the various other legal disincentives to testifying discussed in Part IV of this Article. For example, the defense could seek to exclude not only evidence of prior convictions, but also illegally seized evidence and a portion of the defendant’s testimony at a suppression hearing. Alternatively, or additionally, the motion could condition the presentation of the defendant’s testimony on the trial court’s agreement: (i) not to consider the testimony for purposes of enhancing the defendant’s ultimate sentence (if the defendant is convicted); (ii) to rely on a particular jury instruction regarding defendant or witness credibility; and (iii) to preclude certain lines of prosecutorial argument regarding defendant testimony. Of course, the more conditions the defendant placed on the provision of trial testimony, the less likely the in limine motion would be granted.

To maximize the efficiency of the process envisioned here, stringent procedural requirements would also be required. First, the defendant would be required to commit to testifying if the motion is granted.\textsuperscript{134} To

\textsuperscript{133} An in limine motion is generally considered to be “any motion, whether made before or during trial, to exclude [or admit] anticipated prejudicial evidence before the evidence is actually offered.” Luce v. United States, 469 U.S. 38, 40 n.2 (1984). The term in limine simply means “[o]n or at the threshold; at the very beginning; preliminarily.” \textit{id.} (citing BLACK’S LAW DICTIONARY 708 (5th ed. 1979)).

\textsuperscript{134} There is historical precedent for such a commitment, although not in this form. Prior to the decision in \textit{Luce}, 469 U.S. 38, where the Supreme Court held that a defendant can only appeal the admission of impeachment if he testifies, the federal appellate courts had permitted challenges to in limine rulings even when the defendant did not testify. \textit{See United States v. Washington}, 746 F.2d 104, 106 n.2 (2d Cir. 1984) (citing cases). The courts differed over whether, in such circumstances, a defendant needed to have \textit{committed} to take the stand upon a favorable ruling to preserve the challenge. The Ninth Circuit required the defendant “by a statement of his attorney” to “establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded” and “outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609.” \textit{United States v. Cook}, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc). Other courts saw no merit in this exercise noting that “[t]he defendant incurs no risk by doing so, because even if the court excludes the conviction, he can later decide not to testify without penalty.”
make this commitment meaningful, it should be accompanied by a prospective waiver of the defendant’s rights under Griffin and Carter, a waiver that would take effect only if the motion is granted and the defendant reneges on his commitment. To avoid placing defendants in a position of making potentially damaging commitments to testify without full information, the timing of the in limine motion could be delayed, at the defendant’s election, to the conclusion of the prosecution’s case in chief.

Second, the trial court would be expected to evaluate only one such motion in any case and, absent some showing of good cause, dispose of subsequent motions summarily. This would encourage the defense to make its “best offer” in an initial motion. The trial court would not, however, be barred from soliciting further proposals from the defense or responding to a defense motion with alternative means of inducing testimony—in essence, “testimony bargaining.”

Under the current criminal procedure framework, the district courts arguably already possess the requisite authority to grant a motion made in accordance with the procedures described above. District courts have broad discretion under Rule 609 to exclude prior convictions based on their “prejudicial effect,” and can rely on a largely forgotten, but not yet overruled, strain of case law in which one form of cognizable prejudice is that “the jury will be left without one version of the truth.” Courts
can exclude other impeachment evidence under Federal Rule of Evidence 403 on the ground that the probative value of the impeachment is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or ... waste of time, or needless presentation of cumulative evidence."\(^{137}\) A court may also ground a ruling on its "inherent authority to manage the course of trials"\(^{138}\) and its obligation to protect both the defendant’s constitutional right to testify and the jury’s need to receive a full picture of the contested events.\(^{139}\) Finally, courts have broad discretion as to appropriate jury instructions, prosecutorial argument, and the factors to consider in imposing sentence.\(^{140}\) Thus, working within the trial court’s existing discretionary authority, the parties—or at least the defendant and the court—could agree on a trial framework that would permit otherwise unavailable evidence—the defendant’s testimony—to be presented to the factfinder.\(^{141}\)
Unfortunately, initial resistance to the proposed in limine procedure is to be expected. Courts and practitioners have grown increasingly callous to the value of hearing from defendants and are, in any event, loath to experiment with procedures not explicitly recognized by existing rules.\textsuperscript{142} Thus, even if district courts conclude they have the authority to grant such motions, they may summarily deny them. This could lead to sporadic and uneven application of the procedure throughout the federal courts. Consequently, while there may not be any requirement for specific authorization of the proposed in limine procedure, a federal rule rendering this authorization explicit would be advantageous.

A rule specifically authorizing the proposed procedure would also provide an opportunity to make the prerequisites to a successful in limine motion explicit. The new rule could include the procedural prerequisites noted above and provide an explicit statement of the substantive standard to be applied, for example: \textit{the motion should be granted if the value of presenting the defendant's testimony to the factfinder outweighs the potential impairment of the adversary process that would result from granting the concessions requested by the defense.}

As the above standard suggests, in ruling on the motion the trial court would weigh the value to the jury of the defendant’s testimony in the particular case against the value of the foregone impeachment and other interests sacrificed, if any, if the defendant’s conditions are accepted. To permit the trial court to adequately weigh these factors, the defense motion should include a general proffer of the defendant’s testimony and the court could, if necessary, hold an in camera hearing at which the

\textsuperscript{142} See Douglas L. Colbert, \textit{The Motion In Limine in Politically Sensitive Cases: Silencing the Defendant at Trial}, 39 STAN. L. REV. 1271, 1280–81 (1987) (noting that in the 1960s “\textit{c}ourts began to permit defense lawyers to use the motion in limine to ascertain and limit the scope of the prosecution’s cross-examination of the accused concerning prior convictions or arrests,” but that “[t]he defense bar, however, has had little success in persuading courts to extend the motion’s applicability beyond the preclusion of cross examination concerning the accused’s prior arrests or convictions”).

for the prosecutor to appeal. The prosecutor can appeal certain preliminary rulings, but only before “the defendant has been put in jeopardy” (i.e., when the jury is empanelled and sworn). See 18 U.S.C. § 3731 (2000) (government can appeal “a decision or order of a district court suppressing or excluding evidence” if it does so before “the defendant has been put in jeopardy” and if the prosecutor “certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding”); United States v. Shears, 762 F.2d 397, 399 (4th Cir. 1985).

It is also relatively clear from existing case law that if the trial court granted a motion as proposed here and the defendant testifies, the court could not later renege on the promises that induced the testimony. Johnson v. United States, 318 U.S. 189, 197–99 (1943) (holding that where defendant was cross-examined regarding potential uncharged crime and the court informed him that he could claim a Fifth Amendment right not to respond, it was error to allow later prosecutorial comment on the invocation of the privilege).
defendant would present key portions of that testimony. The prosecution could respond with an opposition filing highlighting any particular harm to the adversary process of the particular concessions requested by the defendant, and perhaps suggesting a compromise solution.

Trial courts will be confronted with wide variation in the "value" of defendant testimony to the jury in particular cases. The trial court should not, of course, attempt to discern the credibility of the testimony, which is the prerogative of the jury; rather the court should evaluate whether the testimony provides any additional factual information that could inform the jury's decision. The value of a defendant's testimony would be highest in circumstances where that testimony would provide the jury with facts otherwise missing from the evidence, or if the defendant's testimony contradicts the facts presented by the prosecution witnesses. On the other hand, a defendant's testimony would hold relatively little value to the jurors if he intends to simply claim that he was not at the scene of the crime (e.g., is the victim of mistaken identity, or was framed by the police). In such a case, the defendant would essentially be offering no facts to the jury other than a claim of innocence which is implicit in the trial itself and can be fully presented by defense counsel through cross-examination of prosecution witnesses and the presentation of alibi witnesses. There will likely be relatively little variance on the other side of the balance—i.e., potential damage to

143. A similar procedure was once authorized for the purpose of evaluating in limine motions regarding prior convictions, although it has since fallen into disuse. See Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967) (suggesting that the trial court "have the accused take the stand in a non-jury hearing and elicit his testimony and allow cross examination before resolving" the impeachment "issue"); United States v. Thomas, 452 F.2d 1373, 1375 (D.C. Cir. 1971) (describing Gordon hearing as one that "required putting the defendant on the stand without the jury being present, and then holding a hearing to elicit defendant's testimony and the proposed cross-examination prior to" the ruling on impeachment); People v. Delgado, 32 Cal. App. 3d 242, 253 (App. 1973), overruled by People v. Rist, 545 P.2d 833 (Cal. 1976) ("[E]xcept, perhaps, where it is obvious what the defendant's testimony would be," the "defendant should testify to his version of the facts in an in camera hearing or, in the alternative, make an offer of proof outside the presence of the jury summarizing what his testimony would be."). At least one court suggested such a procedure survived the enactment of Rule 609, see United States v. Oakes, 565 F.2d 170, 173 (1st Cir. 1977) ("Rule 609(a). . . requires the court in every case to weigh the probative value of admitting the evidence against its prejudicial effect to the defendant, a process which, in many cases a judge may feel is impossible to accomplish conscientiously without hearing defendant's actual testimony.").), a conclusion that is supported by the Supreme Court's ruling that a proper determination of the admissibility of impeachment under Rule 609 is not possible without knowing "the precise nature of the defendant's testimony." Luce, 469 U.S. at 41.

144. See Crane v. Kentucky, 476 U.S. 683, 688 (1986) ("[Q]uestions of credibility, whether of a witness or of a confession, are for the jury . . . .") (quoting Jackson v. Denno 378 U.S. 368, 386 n.13 (1964)). It must be remembered that even if the defendant is obviously lying, and intends to testify to a sequence of events contravened by credible evidence, the presumably false testimony will still be of value to the jury as it demonstrates an otherwise hidden consciousness of guilt.
the adversary process—as the benefit to the adversary system of most of the impeachment that may be excluded and other concessions potentially granted to the defense in exchange for the defendant’s testimony is usually small given the inherent difficulty faced by defendants in convincing juries to credit their testimony and the wide sentencing discretion enjoyed by district courts.  

Of course, defendants who succeed on the motion proposed here obtain only the opportunity to subject their testimony to the crucible of the adversary process, not any guarantee of success at trial. A defendant’s testimony may well be the proverbial final nail in the coffin that enables the jury to develop an abiding belief in the defendant’s guilt. Consequently in many cases, prosecutors would be well advised not to oppose reasonable conditions requested by the defendant in return for testimony, and the trial court would act reasonably in accepting those conditions.

CONCLUSION

Demonstrating the oft-repeated maxim that “[t]here is no war between the Constitution and common sense,”148 this nation’s founders, who “were not naive or disregardful of the interests of justice,”149 worked comfortably within a criminal justice system that took full advantage of the defendant as a factual resource, and where “the fundamental safeguard for the defendant . . . was not the right to remain silent, but rather the opportunity to speak.”150 The reforms suggested here would push the modern criminal trial system back toward these historical roots,

145. See discussion supra Part V.A.

146. The proposed in limine procedure places no added burden on defendants. Even if the motion is denied, the defendant is simply returned to the default framework in which testimony is permitted as long as the defendant accepts the corresponding burdens that attach to the exercise of the right to testify.

147. There is, of course, one windfall beneficiary of permitting the proposed in limine motions: defendants who would have testified regardless of impeachment, or other potential burdens, who may now be able to obtain some minor concessions in return for presenting their testimony. As noted above, however, little is lost even in these cases because the value of foregone impeachment or any other concessions obtained is generally negligible.


150. Langbein, supra note 4, at 1047, 1049 ("Undergirding the criminal procedure of the early modern trial at common law was a set of rules and practices whose purpose and effect were to oblige the accused to respond to the charges against him."); Alschuler, supra note 4, at 2632 ("Where the Framers of the Constitution saw an obligation to the community to speak, later judges and scholars saw a right to refuse to cooperate in what they regarded as a poetic, inspiring contest between the individual and the state."); see also discussion supra Part II.A.; Portuondo v. Agard, 529 U.S. 61, 66 (2000).
and away from a legal framework that cavalierly squanders a rich testimonial resource (the defendant) at great cost to the search for truth and with little benefit. Taking guidance from the discarded intuition of the early American courts—that hearing from the defendant will invariably illuminate, rather than darken, the path to truth—these reforms would reverse the thrust of the existing criminal trial rules to encourage rather than discourage defendant testimony.

The reforms are not intended to, and for the most part will not, penalize or benefit either the prosecution or the defense. Their effect is narrowly focused to simply increase the factual information available to the jury in particular cases, a result that can be expected to improve the reliability of trial outcomes on the uncontroversial principle that “the truth is more likely to be arrived at by hearing the testimony of all persons . . . who may seem to have knowledge of the facts . . . leaving the credit and weight of such testimony to be determined by the jury . . .”  

If we believe, as we claim, that the search for truth is best served by subjecting all relevant testimony to “the crucible” of the adversary system  and that cross-examination is the “greatest legal engine ever invented for the discovery of truth,” there can be little principled objection to the proposed reforms, which merely encourage defendants to inject their testimony into the trial process by which they are to be judged. At the very least, appellate courts and legislators should begin to evaluate the effects of relaxing the penalties for defendant testimony by permitting district courts, in appropriate cases, to encourage defendants to testify by altering the default framework that all too frequently prevents them from doing so.

151. Rock v. Arkansas, 483 U.S. 44, 49–50, 52, 54 (1987) (quoting Washington v. Texas, 388 U.S. 14, 22 (1967)); Amar & Lettow, supra note 3, at 922 (arguing in a related context that “one can simultaneously reduce both false negatives and false positives only by bringing more information into a system” and that “[o]ur current system throws out too much information, and in the end, this hurts both truth-seeking prosecutors and innocent defendants”).

